"It's going to be a soap opera for sure."

— Boston plaintiffs' attorney Michael C. Shepard on a controversial bankruptcy strategy known as the "Texas two-step" employed by companies embroiled in litigation involving asbestos and talc victims

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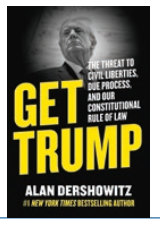

The Fine Print

A review of Alan Dershowitz's newly published book on why Trump was, and remains, so controversial and why representing him provoked such hostility

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IMPORTANT OPINIONS OF THE WEEK

Insurance — Choice-of-law provision

A counterclaim alleging unfair claim settlement practices in violation of G.L.c. 176D and 93A was not barred by a marine insurance policy's choice-of-law provision, as "the plain language of the choice-of-law provision is not broad enough to unambiguously encompass extracontractual claims," the 1st U.S. Circuit Court of Appeals holds.

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Jury and jurors — Polling

A defendant held liable in a civil enforcement action brought by the Securities and Exchange Commission should be granted a new trial because of a violation of the right to poll each of the jurors individually under Rule 48(c) of the Federal Rules of Civil Procedure, the 1st U.S. Circuit Court of Appeals rules.

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Real property — Eminent domain

The town of Hopedale should be enjoined from taking land on which a rail carrier has planned and is working on building a transloading and logistics facility, as the taking is preempted by the Interstate Commerce Commission Termination Act even though the facility is still in the nascent stages of construction, a U.S. District Court judge concludes.

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Licenses and permits — Gas station

The Seekonk Board of Selectmen could deny an application for a new fuel storage license despite the issuance of a special permit by the town's zoning board and site plan approval by the town's planning board, a Land Court judge decides.

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ALSO INSIDE

Google agent not only way to authenticate pics

Exclusion motion denied by judge

By Kris Olson
kolson@lawyersweekly.com

DEPOSIT PHOTOS

A party intending to use a series of aerial Google Earth images had ways to authenticate those images, even absent testimony from an agent of Google or its affiliates, a Land Court judge has ruled, denying a motion in limine to exclude all such photographs from evidence at trial.

In support of his motion, the plaintiff in *Raccuia v. Chen, et al.*, cited a Land Court decision from last fall in the case *Kane v. Harrington*, in which Judge Jennifer S.D. Roberts noted in a footnote that the plaintiffs had not "cited to Massachusetts authority for the proposition that Google Earth photographs are admissible without further authentication."

The plaintiff in *Raccuia* noted the nature of the authentication requirement of §901 of the Massachusetts Rules of Evidence and pointed out that he had no verified information establishing when the photographs were taken, who took them, at what resolution, and whether the photographs had been altered or enhanced by computer.

"Absent testimony from an agent of Google or its affiliates, Defendants cannot attest to the procedures employed by Google in taking any photographs or

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ASSOCIATED PRESS

Former Bristol County Sheriff Thomas Hodgson

Sheriff can be sued over inmate suicide

Judge: MTCA immunity provisions not applicable

By Eric T. Berkman
Lawyers Weekly Correspondent

Civil rights attorneys and mental health advocates say a recent Superior Court decision allowing a lawsuit to proceed against the Bristol County Sheriff's Office for its alleged failure to take reasonable steps to prevent a foreseeable inmate suicide should help make law enforcement entities more accountable for the people in their care.

When the inmate in question, 28-year-old Devon Prado, was booked at the Bristol County House of

Continued on page 14

SJC to decide heirs' battle to void pet trust provision

Dog predeceased owner, leaving estate to charity

By Pat Murphy
pmurphy@lawyersweekly.com

DEPOSIT PHOTOS

The case involves a pet trust established by a testatrix for her cocker spaniel.

The Supreme Judicial Court is preparing to decide whether the fact that a dog predeceased her loving owner rendered inoperative a provision in a pet trust that would send the remainder of the owner's estate to a yet-to-be-named charity.

On May 1, the SJC will hear oral argument in *In re: Estate of Jablonski*. The case involves the meaning of a will executed by Theresa A. Jablonski in 2013. Under the terms of the will, Theresa devised her entire estate to a pet trust for her dog, Licorice, with any remaining assets going to a charity to be selected by the trustee.

After Theresa died in a Framingham nursing home in 2019, three relatives objected to the probate of their aunt's will sought by another relative of the decedent, petitioner Ann Jablonski. The objectors contended that Theresa lacked testamentary capacity and that the will was the product of undue influence. In addition, the objecting heirs contended that the lack of any surviving pet at the time of Theresa's death had caused the only bequest in the will to lapse.

Judge Elaine M. Moriarty, sitting in

Continued on page 15

News Briefs

Contact editorial@lawyersweekly.com

Law firm is sued over data breach

A Massachusetts law firm's failure to take reasonable measures to protect its electronic files resulted in a 2022 data breach that allowed cybercriminals to access the personal and health information of "at least" 12,478 individuals, according to a putative class action recently filed in U.S. District Court in Boston.

"Defendant disregarded the rights of Representative Plaintiff and Class Members by intentionally, willfully, recklessly, or negligently failing to take and implement adequate and reasonable measures to ensure that Representative Plaintiff's and Class Members' [personally identifiable information and protected health information] was safeguarded, failing to take available steps to prevent an unauthorized disclosure of data, and failing to follow applicable, required, and appropriate protocols, policies, and procedures regarding the encryption of data, even for internal use," states the complaint filed on April 17 in *Weekes v. Cohen Cleary*.

The lead plaintiff, Jewell Weekes, is described in the complaint simply as a resident of Massachusetts who provided "highly sensitive" personal information in the course of seeking and obtaining legal services at Cohen Cleary, a 14-attorney litigation firm with offices in Taunton, Plymouth and Quincy. According to the firm's website, Cohen Cleary's areas of practice include personal injury, business litigation, family law and estate planning.

A notice posted on the firm's website states that on or about Jan. 17, 2022, "an unauthorized party accessed a limited number of files from our system."

The notice states that, after a forensic investigation and manual document review, the firm discovered on or about Sept. 30, 2022, "one or more of the files accessed by the unauthorized party on January 17, 2022 contained personally identifiable and protected health information pertaining to a limited number of individuals including, where applicable, full names, addresses, dates of birth, government identification numbers, Social Security numbers, health insurance claims information, financial account numbers, and clinical information."

According to the notice, Cohen Cleary began notifying affected individuals about the security incident on Nov. 22, 2022. Weekes, the lead plaintiff, alleges that she received notice about the data breach in a document dated Nov. 23.

The plaintiff's complaint asserts claims for negligence, negligence per se based on unfair commercial practices that violate the federal FTC Act (15 U.S.C. §45), breach of confidence, breach of implied contract, and breach of the implied covenant of good faith and fair dealing.

"Because Defendant knew that a breach of its systems could damage thousands of individuals, including Representative Plaintiff and Class Members, Defendant had a duty to adequately protect its data systems and the PHI/PII contained therein," the complaint states.

The plaintiff proposes certification of a nationwide class comprised of all individuals "whose PHI/PII was exposed to unauthorized third parties" as a result of the September 2022 data breach and a similarly defined Massachusetts subclass.

The complaint also alleges that Cohen Cleary was negligent in terms of providing notice of the data breach to affected individuals.

"Defendant breached its duty to notify Representative Plaintiff and Class Members of the unauthorized access by waiting months after learning of the Data Breach to notify Representative Plaintiff and Class Members and then by failing and continuing to fail to provide Representative Plaintiff and Class Members sufficient information regarding the breach," the complaint states. "To date, Defendant has not provided sufficient information to Representative Plaintiff and Class Members regarding the extent of the unauthorized access and continues to breach its disclosure obligations to Representative Plaintiff and Class Members."

In terms of damages, the complaint alleges that plaintiffs have and will suffer actual identity theft, and are incurring out-of-pocket expenses associated with the prevention, detection, and recovery from identity theft, tax fraud, and/or unauthorized use of their PHI/PII.

"As a direct and proximate result of Defendant's negligence and negligence per se, Representative Plaintiff and Class Members have suffered and will continue to suffer other forms of injury and/or harm, including, but not limited to, anxiety, emotional distress, loss of privacy, and other economic and non-economic losses," the plaintiff alleges.

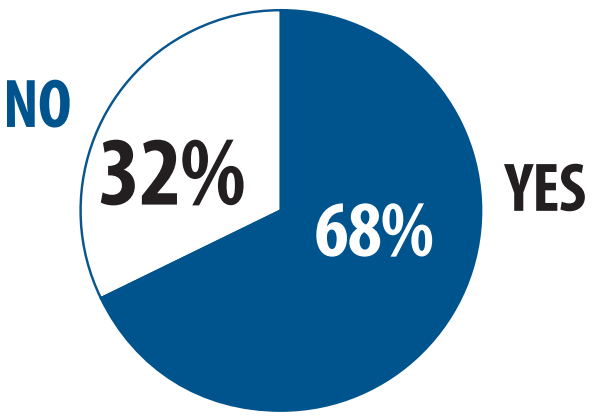
The plaintiff is represented by Martin R. Sabounjian of Boston, Daniel Srourian of Los Angeles, and Scott E. Cole of Oakland, California. Counsel for defendant Cohen Cleary had not entered an appearance as of press time.

The case has been assigned to Judge Nathaniel M. Gorton.

— Pat Murphy

Lawyers Weekly Web Poll Results

Q. Do you agree with Dominion Voting Systems' decision to settle its defamation lawsuit against Fox News over false claims the network made in coverage of the 2020 presidential election?



This week's poll question:

Do you support requiring presidential candidates over a certain age to take competency exams?

To vote, visit masslawyersweekly.com

1st Circuit accepting CJA Panel applications

The 1st U.S. Circuit Court of Appeals is accepting applications for the Criminal Justice Act Panel, including (1) applications from attorneys not currently on the panel; and (2) reapplications from panel members whose terms expire on Sept. 30.

To be considered, an attorney must be a member of the bar of the court in good standing; have a demonstrated knowledge of, and experience with, federal criminal law and appellate procedure; have a commitment to indigent criminal defense; and be willing to accept at least one CJA appellate appointment each year.

Instructions and application forms can be downloaded from the court's website at www.ca1.uscourts.gov under the "CJA Materials" tab. They can also be obtained from the clerk of court.

Attorneys not currently on the panel should complete the form titled "Questionnaire and Application for Membership on the First Circuit Criminal Justice Act Panel" and submit the attachments identified in the form.

Panel members who are reapplying should complete the form titled "Reapplication for Membership on the First Circuit Criminal Justice Act Panel" and submit the attachments identified in the form.

Three paper copies of the completed form and attachments should be mailed to the clerk and must be received no later than June 9 at 5 p.m. Applications cannot be submitted electronically.

Applications will be reviewed by the CJA Panel Advisory Committee, which will make recommendations to the court. Applicants will be notified in early fall. Appointments and reappointments will be for a four-year term.

Attorneys whose terms do not expire on Sept. 30 should not reapply at this time; rather, they will be given an opportunity to reapply closer to the expiration date of their term. Attorneys who want to confirm when their term expires can consult the 1st Circuit website under the "CJA Materials" tab for a list of current panel members. Questions can be directed to Zuleen Nova at 617-748-9380 or Kaitlin Copson at 617-748-9066.

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INSIDE THIS ISSUE

NEWS BRIEFS

editorial@lawyersweekly.com

Land Court adopts new e-filing orders

The Land Court has promulgated a pair of standing orders establishing procedures for electronic filing and mandating e-filing in certain case types, effective June 1.

In adopting the new orders, the Land Court also will rescind Standing Order 2-18, which had established an e-filing pilot program in the court.

The newly adopted standing orders are:

Standing Order 1-23: Land Court Department electronic filing procedures, standards, and guidelines

Standing Order 2-23: Implementation of mandatory electronic filing for attorneys in certain case types in the Land Court Department

The full text of the orders can be found at masslawyersweekly.com.

Ex-prof sentenced in China ties case

A former Harvard University professor convicted of lying to federal investigators about his ties to a Chinese-run science recruitment program and failing to pay taxes on payments from a Chinese university was sentenced on April 26 to supervised release and ordered to pay more than $83,000 in restitution and fines.

Charles Lieber, 64, the former chair of Harvard's department of chemistry and chemical biology, was convicted in December 2021 of two counts of filing false tax returns, two counts of making false statements, and two counts of failing to file reports for a foreign bank account in China.

Lieber was sentenced to time served — the two days he spent in jail after his arrest — and two years of supervised release, with the first six months in home confinement. He was ordered to pay a $50,000 fine and $33,600 in restitution to the IRS, which has already been paid.

Prosecutors in court documents recommended three months in prison, a year of probation, a $150,000 fine, and restitution to the IRS of $33,600.

Lieber's attorneys asked that their client, who no longer works at Harvard and has a form of incurable blood cancer, be spared prison time and get a probationary sentence or home confinement instead.

Prosecutors said Lieber knowingly hid his involvement in China's Thousand Talents Plan — a program designed to recruit people with knowledge of foreign technology and intellectual property to China — to protect his career and reputation.

Lieber denied his involvement during questioning from U.S. authorities, including the National Institutes of Health, which had provided him with millions of dollars in research funding, prosecutors said.

Lieber also concealed his income from the Chinese program on his U.S. tax returns, including $50,000 a month from the Wuhan University of Technology, some of which was paid to him in $100 bills in brown paper packaging, according to prosecutors.

In exchange, they say, Lieber agreed to publish articles, organize international conferences, and apply for patents on behalf of the Chinese university.

Lieber's case was one of the most notable to come out of the U.S. Department of Justice's China Initiative, started during the Trump administration in 2018 to curb economic espionage from China, a program that came under criticism and has since been revamped.

Lieber's attorneys said their client is remorseful and has been punished enough because of his damaged reputation.

Treatment for the cancer has left him with a severely compromised immune system that puts him at greater risk of infection and requires that he live in a sterile environment, they said.

Prosecutors said although involvement in the Chinese program was not illegal, Lieber's "chronic lies" to investigators warranted prison time.

1st Circuit nominee held, others advance

The U.S. Senate Judiciary Committee on April 20 held the controversial nomination of a former New Hampshire attorney general to the 1st U.S. Circuit Court of Appeals, as it voted to send seven other judicial nominees to the full Senate for confirmation votes.

Former New Hampshire AG Michael A. Delaney was among six of President Joe Biden's judicial nominees the committee held over.

The Democrat-controlled committee has been unable to advance some nominees during the absence of Democratic Sen. Dianne Feinstein of California, who has been away from the Senate since February while recovering from shingles. Republicans have rejected a bid to temporarily replace Feinstein on the panel.

Delaney, whom Biden nominated to the 1st Circuit in January, has received scrutiny, including from Democrats, over his signature on a legal brief defending a parental notification law in New Hampshire and his representation of St. Paul's School, a private boarding school in New Hampshire that was sued in connection with a sexual assault.

The committee on April 20 advanced nominees to the Central District of California, the Northern District of Illinois, the District of New Jersey, and the Eastern District of New York.

Biden's nomination of reproductive rights lawyer Julie Rikelman to the 1st Circuit currently is pending before the full Senate. The committee advanced her nomination on an 11-10 vote in February.

Two of Biden's nominees to the U.S. District Court, Boston Municipal Court Judge Myong J. Joun and Deputy State Solicitor Julia E. Kobick, also are awaiting confirmation votes after clearing the committee in February.

Former Ayer District Court Judge Margaret Guzman was confirmed to the U.S. District Court on March 1, with Vice President Kamala Harris breaking a 48-48 tie vote.

Driver is arraigned in Apple Store crash

The driver of an SUV that crashed into a Hingham Apple Store, killing one man and injuring nearly two dozen other people, was traveling as fast as 60 miles per hour in the seconds before the crash and did not apply his brakes as he had told investigators, a prosecutor said in court on April 24.

Bradley Rein, 53, pleaded not guilty in Brockton Superior Court to charges including second-degree murder and 22 counts of assault and battery with a dangerous weapon in connection with the Nov. 21 crash at an outdoor shopping plaza in Hingham.

Kevin Bradley, 65, of Wayne, New Jersey, who was doing construction work at the store, died when he was struck by Rein's 2019 Toyota 4Runner, prosecutors said. The other 22 victims were either struck by the SUV or by debris as it went through the store, prosecutors said.

Rein's vehicle "accelerated to a high speed ... before it veered to the left, drove up onto the sidewalk and then crashed through the glass door of the Apple store, went across the sales floor, and crashed into the rear wall of the store," prosecutor David Cutshall said in court.

An analysis of the vehicle's data recorder indicated that in the five seconds prior to the crash, the vehicle accelerated up to 60 mph, and there was no indication that the brakes were applied.

Rein previously told investigators that his right foot became stuck on the accelerator, and he tried to apply the brakes with his other foot.

The vehicle also turned left at the last moment before the crash, Cutshall said.

Rein's attorney, Joan Fund, said after the arraignment that the crash was an accident and questioned the accuracy of the vehicle's data recorder.

"The data they collect is not infallible, and they do make mistakes, and we will show that through the trial process," she said.

Rein was not impaired by drugs or alcohol, and State Police investigators found no mechanical issues with the SUV that would have contributed to the crash, Cutshall said.

Under an agreement between the prosecution and defense, Rein will remain free on the $100,000 bail he posted after his earlier arraignment in District Court under several conditions, including that he not drive and that he wear a GPS tracking device.

Rein was indicted on the upgraded murder charge in late March. His next court date is June 21.

Several victims have filed lawsuits against the owner of the property, the developer, the management of the property, Apple and Rein, alleging negligence.

Material from The Associated Press and State House News Service was used to compile News Briefs.

JUNIOR JUSTICES

The Supreme Judicial Court recently hosted 19 students from high schools across the state as part of Student Government Day activities. The day began at the State House, where the students learned about the different branches of government, and ended at the John Adams Courthouse, where they enjoyed a pizza lunch with the SJC's law clerks. 'Perhaps what you see today will inspire you to choose to work in the government,' Chief Justice Kimberly S. Budd told her guests. 'You could be a legislator, mayor, clerk, city councilor, governor, judge or a lot of different things.' Pictured with some of the students is Justice Serge Georges Jr., who spoke about the judicial branch and the appellate court process.

Hearsay

hcampagne@lawyersweekly.com

DEPOSIT PHOTOS

Dubious dance

Boston plaintiffs' attorney **Michael C. Shepard** has been tangoing with what has become known as the "Texas two-step" on behalf of asbestos and talc victims for some time, and he doesn't expect the music to stop any time soon.

The "Texas two-step" is a legal strategy by which a company facing significant mass tort liabilities — think J&J or Georgia-Pacific — spins off those liabilities into a new company (LTL Management LLC and Bestwall, respectively, in the case of J&J and Georgia-Pacific), and then has those new companies declare bankruptcy.

The controversial strategy, devised by Dallas-based **Gregory M. Gordon**, has meant big bucks for his firm, **Jones Day**. Published reports peg its rake at about $107 million in fees over the course of five years.

SHEPARD

As Jones Day's clients have tested the boundaries of bankruptcy law, Shepard and his colleagues on the asbestos claimants' committees are trying to hold back the tide.

Shepard is involved with four bankruptcies pending in the Western District of North Carolina, the preferred venue of would-be Texas two-steppers: Bestwall (formerly Georgia-Pacific), DBMP (formerly Certainteed), Aldrich (formerly Ingersoll Rand), and Murray (formerly Trane).

The LTL case was in Charlotte, too, until it was moved to New Jersey in November 2021 over J&J's objections.

In the context of that case, the Texas two-step suffered a setback when the 3rd U.S. Circuit Court of Appeals dismissed LTL's bankruptcy petition in January, ruling that it was not in financial distress when it filed because it had a funding support agreement with J&J that gave it the right to cause J&J to pay it up to an estimated $61.5 million in cash as of the petition date.

"Good intentions — such as to protect the J&J brand or comprehensively resolve litigation — do not suffice alone," Judge **Thomas L. Ambro** wrote for the unanimous three-judge panel. "What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not."

Hanging in the balance in the LTL litigation are more than 40,000 lawsuits alleging that J&J's baby powder and other talc products caused cancer.

Most observers do not expect the two-step to quietly waltz off into the sunset, however. Instead, they believe that the 3rd Circuit decision will spawn a new wave of creativity on behalf of the companies' attorneys to salvage the maneuver.

Companies have been drawn to the Western District of Carolina because they like the 4th Circuit's law regarding bad-faith filing of bankruptcies, Shepard explains.

"The 4th Circuit has an added element that the other circuits don't have," he says.

They had also seen another asbestos manufacturer, Garlock, receive what they considered favorable rulings, he adds.

At its outset, LTL had proceeded like the other "two-steps": J&J, which is headquartered in New Jersey, was "moved" to Texas in the morning. Once it was incorporated there, the company used the Texas divisive merger statute to split the company into two separate entities — "we call them 'good co.' and 'bad co.,'" Shepard says.

The liabilities and a little bit of money were put into one silo, while all the assets were placed into "good co.," which was then moved back to New Jersey and reincorporated.

"From the shareholders and the public's perspective, nothing's changed with respect to Johnson & Johnson," Shepard says. "It just took a quick trip to Texas, and they were able to cleave off their asbestos liabilities into LTL."

LTL — "bad co." — was then moved to North Carolina and bankrupted there.

But in LTL's case, the bankruptcy did not stay there.

"I think the judge probably was getting tired of all these cases being brought in North Carolina that had no real relationship to the forum," Shepard suggests.

Once New Jersey Bankruptcy Court Judge **Michael B. Kaplan** got the case, he allowed it to be certified directly to the 3rd Circuit to assess the victims' claims that the two-step is fraud and a misuse of the bankruptcy system.

Shepard says Ambro, a former bankruptcy judge himself, is as knowledgeable about bankruptcy law as any federal appellate judge in the country.

But when the 3rd Circuit issued its ruling, J&J was ready. It filed a second bankruptcy petition on LTL's behalf before Kaplan, tweaking the funding agreement to bolster the idea that LTL is in "financial distress" by shrinking its access to money.

"But our argument is now it's clearly a fraudulent transfer," Shepard says. "If you've now taken a promissory note to pay open-ended liabilities from Johnson & Johnson to LTL and you've negotiated for a fixed capped amount that's less than full payment, you've essentially transferred away value and assets, so that transfer should be unwound."

Another new wrinkle is that the company is claiming to have on its side 60,000 alleged talc victims in favor of an $8.9 billion settlement, a deal reported by the New York Times, among others.

"We think that's simply not true," Shepard says.

Instead, the claimants' committees believe that alleged support was manufactured with the help of tort mass-filer firms that advertise on television and the internet, Shepard says.

Upon its initial filing, the bankruptcy petition was required to list the top 20 or 30 law firms that represent the most claimants, and the firms in question were nowhere to be found, he notes.

"All of a sudden, they supposedly have 60,000 claimants that they've gotten in the last year and a half," Shepard says. "Maybe they have. But if those are 60,000 legitimate cases, I find it hard to believe that they have found those people, signed all those people to retainers, and vetted all those people as having actual compensable diseases and causal connections to Johnson & Johnson."

That was a subject of much discussion during the first day of hearings on April 11 and will continue to play itself out in the New Jersey Bankruptcy Court, according to Shepard.

"It's going to be a soap opera for sure," he says.

Whether the Texas two-step remains part of the legal landscape over the long haul reportedly has implications beyond asbestos and talc.

"I can see the appeal from a manufacturer's standpoint," Shepard says. "If you were a company manufacturing a product, and you knew that if things got bad and the product harmed a lot of people, all I have to do is do a Texas two-step, silo off that liability, and I can continue as a company, you are disincentivized from taking the necessary measures to protect your customers and the public."

A drug company would have reason to look past potential harmful side effects and rush a product to market, for example.

"Right now, it's just asbestos and talc victims," Shepard says. "But tomorrow, it's going to be pharmaceutical [companies]. It could be automakers. It could be any number of products that are on the market that hurt people. You're essentially removing one of the great safeguards that we have in this country from corporate negligence or malfeasance, and that is the right to a jury trial, the right to hold that company accountable."

Gordon and Jones Day had not responded to requests for comment as of Lawyers Weekly's press time.

— Kris Olson

No good deed goes unrewarded

Mary M. Howie didn't think much of it when she took on the case of a mother and daughter victimized by an unscrupulous lawyer who stole the proceeds from the sale of their home.

"Honestly, I didn't think I was doing anything major," the elder law attorney says. "I was just doing my job."

So when Howie was recently informed that she had been selected to receive the Client Security Board's William J. LeDoux Award, the news didn't really sink in at first.

"OK, thank you very much," Howie told the caller on the other end of the phone. "Are you going to be mailing that to me?"

But then Howie was told she would be receiving the prestigious award from a justice of the Supreme Judicial Court at an upcoming ceremony, and it dawned on her that maybe this was a big deal.

At an April 13 ceremony held in the Seven Justice Courtroom of Boston's John Adams Courthouse, Justice **Frank M. Gaziano** presented the LeDoux award to Howie for securing $184,000 in compensation from the CSB on behalf of the two Massachusetts women who suffered significant financial losses due to the theft of funds by East Brookfield lawyer **Harland L. Smith Jr.**

Howie represented the deceased mother's estate that had as remainder beneficiary a special needs trust, and the deceased mother's daughter, who suffers from mental disabilities and was a beneficiary of the trust.

A member of the Massachusetts chapter of the National Academy of Elder Law Attorneys, Howie says the matter was referred to her by **Lia Marino**, who had been representing the mother until she took a position in the state court system.

One of the first steps Howie took was to become the trustee for the special needs trust that had been established by the mother for her daughter and two sons.

Appearing before the CSB, Howie established that Smith in 2014 had received the net proceeds from the sale of real estate that was jointly owned by the mother and daughter.

But instead of handing over the proceeds to his clients, Smith used the money for his own purposes. Smith was disbarred in 2019 for intentionally misusing client funds in the mother-daughter matter as well as a case in which he represented a wife in a divorce proceeding.

In an April 5, 2019, disbarment order, Gaziano recounted Smith's misdeeds regarding the real property sale in which he acted as trustee.

"On March 28, 2014, the respondent deposited to his IOLTA account $199,421 of the real estate proceeds and $1,022.69 in rental income due to the family," Gaziano wrote. "From these proceeds, the respondent paid the client in the first matter the $160,000 that he owed her. The respondent also paid himself two checks in the amounts of $22,450 and $4,760, which he used for his own purposes, including payment of his personal taxes."

In September 2020, the CSB awarded the mother's estate $32,026 for the value of her life interest in the property. In October 2022, the board awarded $151,840 to the daughter under the special needs trust. The daughter's share of the stolen proceeds equated to the value of her remainder interest in the property.

CSB Chair Gary M. Weiner (left), honoree Mary M. Howie and SJC Justice Frank M. Gaziano

The case was Howie's first effort representing claimants before the board. But she is quick to credit the CSB members and staff for helping her navigate the process.

"The board is very easy to interact with," she says. "At the hearings, they ask great questions."

Howie is the 15th recipient of the LeDoux award, last presented in 2018.

A member of the New Hampshire and Massachusetts bars, she maintains offices in the Granite State as well as in Andover and Woburn.

— Pat Murphy

This Week's Decisions

For full opinions, visit masslawyersweekly.com

1st U.S. CIRCUIT COURT OF APPEALS

Contract

Choice of law – Chapter 93A

Where a G.L.c. 93A count was dismissed based on a choice of law clause in the parties' contract, the judgment of dismissal must be reversed because the choice of law clause does not bar the assertion of the plaintiff's claim.

"Fred Kleiner claims that Cengage Learning Holdings II, Inc., and Cengage Learning, Inc. (collectively, 'Cengage') committed unfair and deceptive business practices under Massachusetts law by intentionally obfuscating information regarding the sales of his published books. Cengage parries that a choice of law clause in its contract with Kleiner bars his suit against it. The district court agreed with Cengage and granted its motion to dismiss. We disagree, and find that the choice of law clause does not bar this lawsuit. …

"Kleiner's putative class action complaint against Cengage on behalf of himself and other authors alleges a single count for violation of Massachusetts General Laws Chapter 93A, which prohibits unfair or deceptive acts or practices in trade or commerce. M.G.L.c. 93A §§2, 11. …

"Cengage moved to dismiss the complaint on the grounds that the choice of law clause in Kleiner's publishing agreement bars the assertion of a claim arising only under Massachusetts law. …

"The district court granted Cengage's motion, reading the choice of law clause as 'mandating that all disputes be resolved according to New York law.' …

"Kleiner appealed. He argues that the agreement's selection of New York law is unenforceable, and that even if it is enforceable, its selection of New York law to construe and govern the agreement does not bar Kleiner's statutory claim under Massachusetts' Chapter 93A. As we will explain, we agree with Kleiner that the choice of law clause does not bar the assertion of Kleiner's claim. And because neither party points to any other respect in which New York and Massachusetts law differ as they might bear on this dispute, we decline to decide whether the choice of New York law is unenforceable. …

"The clause reads, in pertinent part: 'This Agreement shall be construed and governed according to the laws of the State of New York.' Kleiner argues that this clause is too narrow to govern his claim because it directs only that the 'Agreement ... be construed and governed' in accordance with the laws of New York. His claim, he says, is not about how the agreement should be construed or governed; rather, his complaint asserts that Cengage's reporting practices are unfair and deceptive, which does not implicate any dispute concerning the construction of the agreement.

"Cengage counters by pointing to *Northeast Data Systems v. McDonnell Douglas Computer Systems Co.*, 986 F.2d 607 (1st Cir. 1993), in which we held that a contractual choice of law clause precluded the assertion of Massachusetts Chapter 93A claims for 'willfully,' 'knowingly,' or with 'bad motive' breaching a contract, where breach was an essential element of the 93A claims. ... But the choice of law clause in *Northeast Data Systems* cut a much wider swath than does the clause before us in this case. That clause stated: 'This Agreement *and the rights and obligations of the parties hereto* shall be governed by and construed in accordance with the laws of California.' *Id*. at 609 (emphasis added). The much narrower choice of law clause here, by contrast, is for present purposes the same as the clause considered by the Massachusetts Supreme Judicial Court ('SJC') in *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741 (Mass. 1995), which stated that the agreement was 'to be construed under and governed by the laws of the State of California.' ... Distinguishing *Northeast Data Systems*, the SJC found in *Jacobson* that this narrower clause did not preclude or govern Chapter 93A claims. …

"Subsequently, in *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 390 F. App'x 1 (1st Cir. 2010) (Souter, J.), we found that a choice of law clause stating that 'Massachusetts law exclusively shall govern all terms of this Agreement' did not bar a claim brought under a Georgia statute, because 'the narrow choice of law provision' did not state that the 'rights of the parties are to be governed by [Massachusetts] law.' ... Similarly, in *Valley Juice Ltd. v. Evian Waters of France, Inc.*, 87 F.3d 604, 612 (2d Cir. 1996) (citing Jacobson, 646 N.E.2d at 746 n.9), the Second Circuit reversed a district court's dismissal of a Massachusetts Chapter 93A claim where the choice of law clause stated that the 'Agreement is to be governed by the laws of the State of New York.' The Second Circuit concluded that 'Massachusetts would not interpret the choice of law clause in the Agreement to bar Valley's [Chapter 93A] claim by requiring that it proceed under New York law.' …

"The clause at issue in this case states only that '[t]his Agreement shall be construed and governed' according to New York law. It does not otherwise select any state's law as governing the parties' rights and obligations that are created by statute. Nor does it 'mandat[e],' as the district court mistakenly asserted, 'that all disputes be resolved according to New York law.' Therefore, the agreement does not suggest that the parties agreed that New York law would govern the adjudication of a claim that Cengage breached a statutory duty imposed by Massachusetts law. This conclusion is supported by *Jacobson*'s determination that a choice of law clause stating an agreement was 'to be construed under and governed by' one state's law does not extend to bar a statutory claim under another state's law. 646 N.E.2d at 746 n.9. …

"For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion."

Kleiner v. Cengage Learning Holdings II, Inc., et al. (Lawyers Weekly No. 01-073-23) (13 pages) (Kayatta, J.) Appealed from a decision by Stearns, J., in the U.S. District Court for the District of Massachusetts. Richard Weingarten, with whom David Slarskey, Slarskey LLC, Edward V. Colbert III, David Koha and Casner & Edwards were on brief, for the plaintiff-appellant; Michael R. Gottfried, with whom Duane Morris LLP was on brief, for the defendants-appellees (Docket No. 22-1451) (April 19, 2023).

Criminal

Supervised release – Revocation

Where a defendant whose supervised release was revoked was sentenced to nine months, there was no abuse of discretion in the district court's choice of sentence.

Affirmed.

"The appellant's attack on his revocation sentence is narrowly focused. At sentencing, the appellant proffered — for the first time — a claim of recent employment. According to the appellant, the district court 'found the employment was a sham' and '[a]s such, the court transformed a mitigating fact (employment) into an aggravating circumstance.' This misguided outlook, the appellant says, infected the whole of the sentencing proceeding and irrevocably tainted the court's resolution of the matter. But the sentencing record tells a different tale.

"The court's bench decision, revoking the appellant's term of supervised release and imposing the challenged sentence, is emblematic. The court began by briefly mentioning the unsigned 'employment letter' that the appellant first presented at the revocation hearing. The court stated that this document had been tendered 'on the very last minute,' that it was 'highly convenient,' and that it was not 'good evidence.' The court, therefore, declined to credit the evidence in mitigation, and that decision was well within the encincture of the court's discretion. …

"Having supportably set aside the last-minute attempt at mitigation, the court went on to explain the key elements of its sentencing determination. …

"In this venue, the appellant does not challenge either the revocation order or the district court's calculation of the advisory guideline sentencing range. He challenges only the length of the sentence imposed. That challenge fails: the district court articulated a plausible sentencing rationale and imposed a within-guidelines sentence that — considering the appellant's persistent noncompliance with the conditions of his supervised release — clearly represented a defensible result. No more was exigible. …"

United States v. Rivera-Berríos (Lawyers Weekly No. 01-074-23) (6 pages) (Selya, J.) Appealed from the U.S. District Court for the District of Puerto Rico (Docket No. 22-1681) (April 19, 2023).

Insurance

Choice-of-law provision – Marine policy

Where a U.S. District Court judge ruled that a counterclaim filed by a policyholder alleging unfair claim settlement practices in violation of G.L.c. 176D and 93A was barred by the choice-of-law provision of the marine insurance policy he purchased, that ruling must be reversed because the plain language of the choice-of-law provision is not broad enough to unambiguously encompass extracontractual claims.

"This maritime insurance case from Massachusetts arises on interlocutory appeal pursuant to 28 U.S.C. §1292(a)(3) from the district court's grant of judgment on the pleadings in favor of the plaintiff-insurer, Great Lakes Insurance SE (GLI). The defendant, Martin Andersson, asserted that GLI engaged in unfair claim settlement practices in violation of Massachusetts General Laws chapters 176D and 93A. The district court ruled that Andersson's claim was barred by the choice-of-law provision of the marine insurance policy he purchased from GLI. For the reasons that follow, we conclude that the choice-of-law provision is ambiguous as to what law applies to the statutorily based claim that is at issue. Consistent with the applicable principles of interpretation we construe this ambiguity against the drafter — GLI — and conclude that Andersson's Massachusetts state law claim is not subject to the choice-of-law provision. Accordingly, we reverse. …

"On February 27, 2020, GLI brought a declaratory judgment action to determine whether there was coverage under the policy. …

"Andersson filed an answer and counterclaim alleging, inter alia, a statutorily based claim for violations of chapter 176D, section 3(9) and chapter 93A, section 9(3A) of the Massachusetts General Laws, which — taken together — prohibit unfair or deceptive acts or practices in the business of insurance. …

"… GLI contended that Andersson's unfair trade and settlement practices claim under Massachusetts law was barred by the policy's choice-of-law provision. Specifically, GLI argued that the policy's choice-of-law provision dictated that any issue not governed by an entrenched rule of federal admiralty law was governed by New York law. Thus, GLI pressed, Andersson's Massachusetts state law claim failed as a matter of law. …

"The district court rejected Andersson's position. It ruled that pursuant to the choice-of-law provision, New York law governed and barred Andersson's Massachusetts counterclaim. The district court reasoned that, in the absence of well-established admiralty law, New York law applied to all claims, including extracontractual claims, arising from and related to performance under the policy. Therefore, because New York law does not provide for a chapters 176D and 93A claim, the district court dismissed Andersson's counterclaim. …

"From this posture, we consider whether the choice-of-law provision in the policy requires the application of New York law to extracontractual claims arising between the parties outside the scope of federal admiralty law, thereby barring Andersson's Massachusetts state law claim. …

"As an initial matter, Andersson does not contest that the choice-of-law provision is valid and enforceable. He also concedes that entrenched principles of admiralty law would control an extracontractual claim if such precedent existed.

"Thus, Andersson's challenge centers on the proper interpretation of the choice-of-law provision when faced with an extracontractual claim that is not governed by entrenched principles of admiralty law. Andersson maintains that the second, disjunctive clause of the choice-of-law provision — which states that 'this insuring agreement is subject to the substantive laws of the State of New York' — 'narrowed the application of New York law to the insuring agreement[,]' and not to extracontractual claims. He thus asserts that his statutory extracontractual claim does not fall within the ambit of the choice-of-law provision. …

"Because Andersson does not dispute that contract-related claims fall within the scope of the choice-of-law provision, the first issue we must resolve is whether Andersson's counterclaim is, in fact, extracontractual. …

"As pleaded, contract violations are not at the core of Andersson's chapters 176D and 93A claim. Andersson never alleges that GLI violated chapter 176D by breaching, or taking actions forbidden by, the contract. … Rather, Andersson's allegations — taken in the light most favorable to him — are not duplicative of a breach of contract claim based on the policy. Thus, Andersson's claim is extracontractual. …

"Having established the nature of

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THIS WEEK'S DECISIONS

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1ST U.S. CIRCUIT COURT OF APPEALS

Continued from page 5

Andersson's claim, we must now address the exact scope of the choice-of-law provision. …

"We begin with the actual language of the policy and give the words their plain and ordinary meaning. … The choice-of-law provision first provides that 'any dispute arising hereunder' is subject to entrenched admiralty principles. Andersson's chapters 176D and 93A claim is a 'dispute arising hereunder,' and there is no 'well established, entrenched principles and precedent of substantive United States Federal Admiralty law' governing unfair trade and claim settlement practices. Absent admiralty precedent, the choice-of-law provision does not specifically dictate what law applies to a 'dispute arising hereunder,' but instead proceeds to state that 'this insuring agreement is subject to the substantive laws of New York.'

"This differential in wording employed by GLI in the choice-of-law provision — 'any dispute arising hereunder' versus 'this insuring agreement' — creates ambiguity because it is subject to more than one reasonable interpretation. … Indeed, two distinct classes of claims are arguably contemplated in the choice-of-law provision. The first clause encompasses 'any dispute arising hereunder,' which could include contract-related and extracontractual claims. But, the second clause is limited to 'this insuring agreement,' which could be limited to contract-related claims. Only these contract-related claims are specifically subjected to New York law. It is entirely unclear whether extracontractual claims — even if they may be said to 'arise[] hereunder' — are also subject to New York law.

"… The term 'this insuring agreement' should be given meaning and effect apart from the term 'any dispute arising hereunder.' Using both terms makes the scope of the choice-of-law provision ambiguous. …

"Because the plain language of the choice-of-law provision is not broad enough to unambiguously encompass extracontractual claims, 'any ambiguities must be construed in favor of the insured.' …

"… When, as here, there are 'competing plausible interpretations of the insurance policy "doubts as to the intended meaning of the words must be resolved against the insurance company that employed them."' … Doing so leads to the inescapable conclusion that *only* contract-related claims are subject to the substantive laws of New York. Extracontractual claims do not fall within the scope of the second clause of the choice-of-law provision.

"Having already determined that Andersson's chapters 176D and 93A claim, as pleaded, is extracontractual and forms a cause of action independent from the insuring agreement, it does not fall within the scope of the choice-of-law provision. …

"For the reasons stated above, the judgment of the district court is reversed."

Great Lakes Insurance SE v. Andersson (Lawyers Weekly No. 01-071-23) (16 pages) (Montecalvo, J.) Appealed from a decision by Hillman, J., in the U.S. District Court for the District of Massachusetts. Michelle M. Niemeyer, with whom Michelle M. Niemeyer, P.A., Harvey B. Heafitz and Davagian Grillo & Semple were on brief, for the defendant-appellant; Michael I. Goldman, with whom Goldman & Hellman was on brief, for the plaintiff-appellee (Docket No. 21-1648) (April 19, 2023).

Jury and jurors

Polling – Rule 48(c)

Where a jury returned a unanimous verdict against a defendant in a civil enforcement action brought by the Securities and Exchange Commission, the defendant is entitled to a new trial because of a violation of the right to poll each of the jurors individually under Rule 48(c) of the Federal Rules of Civil Procedure.

"A party to a civil jury trial has the right under Federal Rule of Civil Procedure 48(c) to request that the district court individually poll each juror after the jury has returned a verdict to confirm that each juror agrees with the verdict that was announced. The question presented in this interlocutory appeal is whether a party that has been denied that right is automatically entitled to a new trial, even when the jury has been polled collectively, or whether — given that Federal Rule of Civil Procedure 61 instructs that we 'must disregard all errors ... that do not affect any party's substantial rights' — that party must show prejudice in the specific case at hand to be entitled to that remedy.

"We have not had occasion to address this question before. But, we have long held that denial of the right under Federal Rule of Criminal Procedure 31(d) to poll each juror individually in a criminal case is per se reversible error, *see Miranda v. United States*, 255 F.2d 9, 18 (1st Cir. 1958); *Ira Green, Inc. v. Mil. Sales & Serv. Co.*, 775 F.3d 12, 25 (1st Cir. 2014), even though Federal Rule of Criminal Procedure 52(a) sets forth an analogue to Civil Rule 61, *see* Fed. R. Crim. P. 52(a) ('Any error ... that does not affect substantial rights must be disregarded.'). In light of the arguments presented, and given that we do not write on a clean state but are instead bound by circuit precedents that we have no occasion to consider anew here, we conclude that our circuit law points us to interpreting Civil Rule 48(c) no differently from our interpretation of Criminal Rule 31(d). …

"The issue was randomly assigned to Judge Richard G. Stearns. After receiving additional briefing from the parties, he ruled that a violation of the right to poll each of the jurors individually under Civil Rule 48(c) is per se reversible and that Sargent was therefore entitled to a new trial. …

"The issue that we address is whether, under our precedent, the District Court's denial here of the right to poll each juror individually under Civil Rule 48(c), after the jury had been collectively polled, was per se reversible error. …

"Perhaps the SEC's strongest argument for its position is 'the historic difference between how courts review errors in criminal and civil cases.' …

"All that said, the SEC is right that, as we noted in *Ira Green*, several state courts treat jury-polling errors as per se reversible in the criminal context but not in the civil context. … But, state court decisions are not a basis to depart from our precedent. For the reasons we have explained, when we consider the text of each of the relevant federal rules in light of *Miranda* and *Ira Green*, as well as *Cabral [v. Sullivan*, 961 F.2d 998, 1003 (1st Cir. 1992)] and [*United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996)], we see no basis for drawing the distinction that some state courts have drawn in interpreting their own state law rules."

U.S. Securities and Exchange Commission v. Sargent (Lawyers Weekly No. 01-070-23) (20 pages) (Barron, C.J.) Appealed from a decision by Stearns, J., in the U.S. District Court for the District of Massachusetts. Paul G. Alvarez, with whom Dan M. Berkovitz and Michael A. Conley were on brief, for the plaintiff-appellant; Peter R. Ginsberg, with whom Christopher R. Neff and Moskowitz & Book were on brief, for the defendant-appellee (Docket No. 22-1596) (April 18, 2023).

Search and seizure

Accident scene – Consent

Where the defendant, a passenger in a single-vehicle car crash, moved to suppress evidence found by state troopers who searched her bag, a judge's decision to deny that motion should be upheld because (1) the defendant's initial encounter with the State Police was not a traffic stop, (2) any subsequent seizure of the defendant — if one occurred at all — was supported by reasonable suspicion, and (3) she voluntarily consented to the search of her bag.

"Turning back to the case before us, we conclude that, under the totality of the circumstances, the troopers' arrival on scene and initial accident response, which included speaking with the occupants about the crash and running identification checks, did not constitute a *Terry* stop. …

"Nor did the troopers' actions during the initial accident response transform the encounter into a *Terry* stop where the evidence demonstrates that a reasonable person would have felt 'free to decline the officers' [help] or otherwise terminate the encounter,' and [defendant Yolanda] Howard herself did so during the initial part of the encounter. …

"While other factors — such as the troopers' request for Howard's identification, use of emergency lights, and Trooper [Anthony] Keim's prompt arrival on scene — could indicate that a seizure occurred during the initial accident response, when balanced against the totality of the circumstances, they do not compel a finding that the initial encounter here was a *Terry* stop. …

"Our next task would normally be to determine whether a seizure occurred at any point thereafter. But, because a seizure is constitutionally valid when preceded by reasonable suspicion, … and because we conclude, *infra*, that reasonable suspicion arose before any even arguable seizure could have occurred, we assume without deciding that a seizure akin to a *Terry* stop took place as Howard's interaction with the troopers progressed. …

"The district court concluded, and we agree, that under the totality of the circumstances, troopers had more than a 'hunch' that the vehicle or its occupants, particularly Howard, carried drugs from almost the outset of the encounter. …

"Having concluded that reasonable suspicion preceded Howard's assumed seizure, any detention of Howard — if one occurred at all — did not offend the Fourth Amendment and thus was lawful. As such, her argument for suppression based on unlawful detention fails. …

"Having rejected Howard's unlawful detention argument, we now turn to the issue of Howard's consent to the search of her bag. …

"We first address Howard's argument that her consent was coerced in part because she was in custody. As support for her contention, she cites the circumstances of her alleged detention and the presence on scene of five state troopers, including a K9 unit. The district court disagreed, concluding that Howard was not in custody. We find no error here. …

"Here, the district court concluded that no reasonable person in Howard's shoes would believe that she was being held under circumstances akin to a formal arrest. We agree. …

"Howard also contends that her consent was coerced because troopers conditioned her ability to sit in the warm cruiser on her agreeing to the bag search, but she provides no support for her assertion. Moreover, her contention is belied by the district court's findings. …

"Howard's final argument is that the district court erred in finding that her consent was voluntary under the totality of the circumstances. In support, Howard asserts that — in addition to the coercive elements discussed above — she was in her early twenties at the time of the search, she had graduated from high school but from a program for people with disabilities, she has less than average intelligence, she had very little experience with the criminal justice system, and troopers did not tell her that she could refuse to consent, nor was she aware that she could refuse. Notably, Howard failed to develop the facts pertaining to her age, intelligence, and education during the suppression hearing, and instead raises them for the first time on appeal. However, even if we were to consider Howard's newly proffered facts, they fail to convince us that the district court erred in its voluntariness finding.

"Howard does not meaningfully discuss how her disability or intelligence level impacted her ability to consent. Nor does she explain why contact with law enforcement for only minor offenses is significant to whether her will was overborne. To the extent that Howard relies on the lack of a warning regarding her right to refuse consent, said fact is relevant but not dispositive. 'We have repeatedly held that the failure to advise a defendant of his right to refuse consent does not automatically render such consent invalid.' *United States v. Jones*, 523 F.3d 31, 38 (1st Cir. 2008). Here, the district court properly considered the totality of the circumstances — including the lack of a warning, the presence of multiple troopers on scene, and the cold conditions — before concluding that Howard voluntarily consented to the search of her bag. We discern no clear error in the district court's finding, particularly given the lack of 'evidence of coercive tactics.' … Accordingly, Howard's argument for suppression, premised upon her involuntary consent to the search of her bag, also fails."

United States v. Howard (Lawyers Weekly No. 01-072-23) (30 pages) (Gelpí, J.) Appealed from the U.S. District Court for the District of Maine (Docket No. 22-1111) (April 19, 2023).

U.S. DISTRICT COURT

Real property

Eminent domain – Preemption

Where a plaintiff rail carrier has moved for a preliminary injunction to prevent the defendant town from taking land on which the plaintiff has planned and is working on building a transloading and logistics facility, that motion should be allowed because the town's proposed taking is preempted by the Interstate Commerce Commission Termination Act.

"At its core, this is a dispute between Grafton & Upton Railroad Company ('GURR' or 'Plaintiffs'), a Class III rail carrier, and the Town of Hopedale, regarding a portion of property at 364 West Street in Hopedale,

Continued on page 12

Verdicts & Settlements

Contact editorial@lawyersweekly.com

EDITOR'S NOTE: Barring unusual circumstances, Lawyers Weekly publishes all verdict and settlement reports submitted to the newspaper by both plaintiffs' lawyers and defense counsel. The information published here is taken directly from the submitting lawyer's summary.

Jury finds for mother who suffered subarachnoid hemorrhage

$4.2 million verdict

A nine-person jury found against a Baystate ER doctor and her physician's assistant after a two-week trial in Springfield.

The allegation was failure to diagnose a subarachnoid hemorrhage due to an aneurysm in a 36-year-old mother of two who presented to the ER with 10/10 headache and neck stiffness in February 2017. The PA, in his differential diagnosis, ordered a CT scan that was reported as negative.

The plaintiff argued that the standard of care required a lumbar puncture to be performed in addition to the CT, since the onset of symptoms was more than six hours out and the CT would not be reliable. The PA's supervising physician simply signed the report the next day and never saw the patient.

Eleven days later, the plaintiff presented again to Baystate ER by ambulance with worsening symptoms including nausea, vomiting and severe headache. She was triaged at 2:30 a.m. by two triage nurses and seen by another PA and ER doctor five hours later, but she was not sent to coiling until 4:30 p.m. By then, her aneurysm had ruptured, and then re-ruptured during the coiling procedure, causing complications that the defense claimed caused her neurological sequalae.

There were no offers of settlement made prior to trial or the jury's verdict. The plaintiff's attorney had an ER expert and vascular-neuro expert testify, as well as a vocational expert who testified as to lost earning capacity and future medical expenses, which together totaled $4.5 million.

The defense called four experts and the treating doctor who performed the coiling procedure that resulted in complications and which the defense claimed to be the cause of her neurological sequelae.

The jury deliberated for approximately seven hours and awarded $4.2 million for pain and suffering, lost earning capacity, and future medicals. With interest, the judgment is $5,244,385.88 .

Action: Medical malpractice

Injuries alleged: Failure to diagnose subarachnoid hemorrhage

Case name: Velasquez v. Torrey, M.D., et al.

Court/case no.: Hampden Superior Court/ No. 1979CV00334

Jury and/or judge: Jury/Judge Edward J. McDonough Jr.

Amount: $4,196,126

Date: March 15, 2023

Attorney: Florence A. Carey of Crowe & Harris, Boston (for the plaintiff)

Undiagnosed gastric leak necessitates removal of stomach

$1 million settlement

The plaintiff had laparoscopic sleeve gastrectomy performed in October 2016. Several months later, she began complaining of symptoms consistent with a gastric leak.

In February 2017, a CT scan was interpreted as demonstrating findings "consistent with a gastric leak." The radiology department informed the surgeon of the findings, but there was no follow-up at the next office visit or at the subsequent yearly follow-up visits.

Three years later, the plaintiff began experiencing significant symptoms, and in June 2020 the broncho-gastric fistula was discovered, necessitating removal of the left lower lobe of the lung, as well as the entire stomach and duodenum.

The plaintiff alleged that if the gastric leak had been recognized and treated in 2017, all of the complications would have been prevented. The defendant countered that a watch-and-wait approach was in compliance with the standard of care.

The defendant surgeon had a $1 million policy limit. The case settled soon after suit was filed and before discovery started.

Action: Medical malpractice

Injuries alleged: Undiagnosed gastric leak necessitating removal of left lower lobe of lung and entire stomach and duodenum

Case name: Withheld

Court/case no.: Withheld

Jury and/or judge: N/A (mediated)

Name of mediator: John Ryan of Boston

Highest offer: $1 million

Amount: $1 million

Special damages: Medical charges, $1.1 million; health insurance final demand (lien repayment amount), $106,000

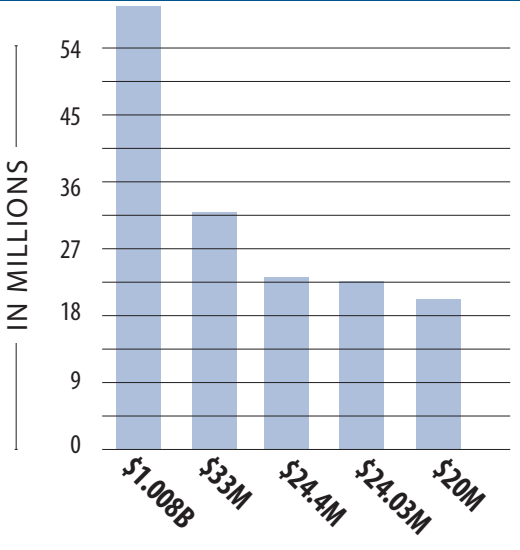
Date: Oct. 18, 2022

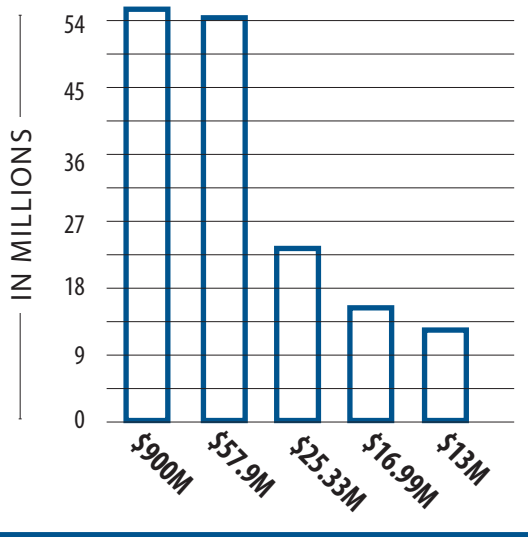
Attorneys: Chris Dodig and Kyle Christensen, of Donovan, O'Connor & Dodig, Pittsfield (for the plaintiff)

VERDICTS & SETTLEMENTS

editorial@lawyersweekly.com

TOP VERDICTS & SETTLEMENTS: MAY 2022 – APRIL 2023





VERDICTS AND AWARDS

$1.008B ***Fontaine v. Philip Morris;*** JJury returns verdict for family and estate of longtime smoker who dies of lung cancer; Andrew A. Rainer, Mark Gottlieb and Meredith K. Lever, of Public Health Advocacy Institute, Boston; Kevin Donovan of Westwood; Randy Rosenblum of Florida

$33M ***Weichel v. Commonwealth;*** Jury finds for man who spends 36 years in prison in wrongful conviction case; Mark Reyes and Quinn Rallins, of Chicago-based Loevy & Loevy; Howard Friedman of Boston

$24.4M ***Chime Media LLC v. Kosowsky;*** After resigning, COO disparages company, harms relationships; Lee E. Rajsich of Rajsich & Associates, Boston; Robert D. Cohan of Cohan, Rasnick, Plaut, Boston

$24.03M ***Menninger v. PPD Development, L.P.;*** Executive who discloses mental health disability sues employer for bias; Patrick J. Hannon of Hartley, Michon, Robb, Hannon, Boston

$20M ***Luppold v. Lowell General Hospital, et al.;*** Above-the-knee amputation after ER misdiagnoses blood clot as sciatica on two separate occasions; Robert M. Higgins of Lubin & Meyer, Boston

SETTLEMENTS

$900M* ***United States ex rel. Bawduniak v. Biogen Inc.;*** Whistleblower alleges pharmaceutical company paid kickbacks to doctors, other medical professionals (whistleblower receives $250M); Thomas M. Greene of Greene LLP, Boston

* Case litigated by relator's counsel alone; government declined to intervene in July 2015

$57.9M ***Sniadach, et al. v. Walsh, et al.;*** COVID-19 outbreak at state-operated Holyoke Soldiers' Home takes lives of several dozen military veterans, infects 164 more; Michael E. Aleo and Thomas B. Lesser, of Lesser, Newman, Aleo & Nasser, Northampton

$25.33M ***Case named withheld;*** Tractor-trailer hits temporary barrier, slams into car; : Ben Zimmermann and David P. McCormack, of Sugarman & Sugarman, Boston

$16.99M ***Case named withheld;*** ; Head-on collision results in permanent leg injury; plaintiff will always require use of cane; J. Tucker Merrigan, Peter M. Merrigan and Matthieu J. Parenteau, of Sweeney Merrigan Law, Boston

$13M ***Case name withheld;*** Teen suffers traumatic brain injury after car is rear-ended by box truck; William H. Sims of Sims & Sims, Brockton and Plymouth; Kim Winter of Mclaughlin, Richards, Biller, Schindel & Winter, Natick

Bar Discipline

Contact Henriette Campagne at hcampagne@lawyersweekly.com

Admonition No. 23-03

The respondent was admitted to the Massachusetts bar in 2013. In 2016, the respondent began working as an attorney in the state of New York, where she was also admitted to practice law. While working in New York, she remained as in-house counsel to one Massachusetts company.

In 2017, the respondent failed to re-register and pay her annual registration fee to the Massachusetts Board of Bar Overseers. Her license to practice law in Massachusetts was therefore administratively suspended. Her New York license, however, remained active. Following the entry of the order of administrative suspension, the respondent, unaware of her suspension, continued to provide legal services to the Massachusetts company for approximately three and a half years. Upon learning of her suspension, the respondent took immediate steps to return to active status. The respondent was reinstated shortly thereafter.

The respondent's provision of legal services to the Massachusetts client while she was administratively suspended from practicing law in Massachusetts violated Mass. R. Prof. C. 5.5(a).

The respondent has no prior disciplinary history. She accordingly received an admonition for her misconduct.

***

Admonition No. 23-04

In 2019, the Committee for Public Counsel Services ("CPCS") assigned representation of a juvenile to the respondent in connection with a care and protection matter. The respondent effectively represented the juvenile throughout a lengthy proceeding. In December 2021, however, the respondent decided to withdraw from the matter because of various personal circumstances. The final day of trial in the matter was scheduled for December 16, 2021.

The respondent failed to advise the court in advance that she would not be able to appear on December 16, 2021. On the day of the trial, the respondent emailed the clerk to say that she would not be attending the trial and intended to withdraw from the case. The clerk advised the respondent that she must file a motion to withdraw and appear in court that day to present a closing argument.

The respondent did not file a motion to withdraw or appear that day; thus the court continued the trial as to the respondent's client. The respondent later filed the motion to withdraw and assisted successor counsel in transitioning the case from the respondent to new counsel. The client was not harmed.

By failing to appear at the trial of her client's case and failing to inform the court beforehand, the respondent violated Mass. R. Prof. C. 1.3. By effectively withdrawing from her representation of the client without first obtaining the permission of the court to withdraw, the respondent violated Mass. R. Prof. C. 1.16(c).

The respondent was admitted to the bar in 2016 and has no previous discipline. The respondent received an admonition for this misconduct.

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Admonition No. 23-05

The respondent was admitted to the bar of Massachusetts on December 29, 1995. She was not admitted in any other state jurisdiction. From 2008 until 2020, the respondent worked in roles including senior vice president and general counsel for a corporation. During this period, the respondent mistakenly believed that she could hold such corporate positions as an in-house lawyer without an active law license because she was not appearing before any court, regulatory and/or administrative bodies. Nonetheless, the respondent registered annually as an active lawyer and paid the registration fee to the Board of Bar Overseers (Board).

In June 2020, the respondent began employment as Chief Operating Officer for another corporation. The respondent neglected to update her registered contact information with the Board. In August 2020, the Board mailed several registration notices to the respondent, but she did not receive them. The respondent failed to register and pay the registration fee due in September of 2020. On February 21, 2021, the respondent was administratively suspended by order of the Supreme Judicial Court.

By March 5, 2021, the respondent became aware of her administrative suspension. Based upon her mistaken belief that she could work as Chief Operating Officer without an active law license given the nature of her work, the respondent did not seek reinstatement at that time. She continued her employment as chief operating officer until August 2021, at which time she became the Chief Legal Officer for an out-of-state corporation. As with her prior corporate positions, this job did not require her to make any appearances on behalf of her client in any adjudicatory settings.

In April 2022, the respondent left her in-house job and was considering potential opportunities, including possibly providing pro bono legal services to a legal aid nonprofit. The respondent believed she would possibly be expected to represent individuals and appear before court, regulatory and/or administrative bodies. The respondent accordingly submitted a request for reinstatement and paid all outstanding registration fees. Shortly thereafter, the respondent was reinstated.

By practicing law while administratively suspended, the respondent violated Mass. R. Prof. C. 5.5(a). As noted, at all relevant times, the respondent mistakenly believed that she did not need an active law license because she was not appearing before any court, regulatory and/or administrative bodies.

The respondent was admitted in 1995 and has no disciplinary history. The respondent cooperated with bar counsel's investigation, acknowledged her mistake of not immediately seeking reinstatement after being administratively suspended for failure to register, and expressed remorse. She received an admonition for her misconduct.

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SJC No. 2023-006
In Re: Daniel G. Ruggiero
275 Grove St., Suite 2400
Auburndale, MA 02466

Order (term suspension) entered by Justice Wendlandt on March 15, 2023, with an effective date of April 14, 2023

The respondent was suspended for a year and a day for participating with nonlawyers in a scheme to charge and collect illegal and excessive fees from homeowners seeking mortgage relief, failing to supervise the nonlawyers with whom he worked, using a misleading firm name, sharing fees with nonlawyers, and other misconduct.

Summary

The respondent was charged, in a two-count Petition, with participating with nonlawyers in a scheme to charge and collect illegal and excessive fees from Massachusetts and Rhode Island homeowners seeking mortgage relief, and related misconduct. Count 1 of the Petition focused on the respondent's general activities, while Count 2 focused on a particular Rhode Island client.

A Hearing Committee determined that the respondent, whose firm name misleadingly implied that he had associates when he was actually a solo practitioner, had entered into relationships with two companies for the purpose of offering mortgage assistance relief services to homeowners facing foreclosure. The companies were not staffed by lawyers, and the respondent did not properly supervise the nonlawyer personnel who worked on his cases. Homeowners facing foreclosure were induced to pay high fees to engage the respondent's services; the respondent himself did very little actual work, and the homeowners rarely got mortgage relief. The respondent's misconduct was found to violate many rules of professional conduct in both Massachusetts and Rhode Island, among them Massachusetts rule 1.5(a) (illegal and clearly excessive fees); 5.3(b) (failure to supervise nonlegal staff); 5.3(c) (knowingly ratifying misconduct of nonlawyers); 5.4 (a) (splitting fees with nonlawyers) 7.1 (misleading communication about lawyer's services); 7.5 (a) and (d) (misleading firm name); 8.4(a) (knowing rules violations); 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); rule 8.4(h) (other conduct that reflects adversely on fitness to practice law); and Rhode Island rules 1.1, 1.4(a), 1.4(b), 8.4(a) and 8.4(c) by providing his clients incompetent or misleading information.

There were no mitigating factors. In aggravation, the respondent was found to be an experienced lawyer who had violated numerous disciplinary rules concurrently, caused harm to many clients, and displayed a lack of candor to the hearing committee.

The hearing committee and, upon review, the Board of Bar Overseers, recommended a year-and-a-day suspension from practice. The Single Justice agreed that this recommendation was appropriate.

On March 15, 2023, Justice Wendlandt ordered the respondent suspended for a year and a day.

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Public Reprimand No. 2023-4
In re: Andrew D. Ott
1132 Westfield St., Suite 2
West Springfield, MA 01089

Order (public reprimand) entered by the Board of Bar Overseers on March 21, 2023

The respondent stipulated to a public reprimand for his neglect of a client matter, failure to communicate with the client, lack of a written fee agreement and failure to terminate the representation.

Summary

The respondent was admitted to practice law in Massachusetts in 2015.

On or around July 18, 2017, a client retained the respondent to represent him in a divorce. The client verbally agreed to pay the respondent a flat fee of $6,500 in installments. The respondent did not provide the client with a written fee agreement or otherwise communicate in writing the scope of the representation or the rate and basis of the fee. The client made an initial payment of $2,500.

Between July 18, 2017, and October 26, 2017, the respondent began work on the case and communicated several times with the client to discuss strategy and how to proceed. The client paid the respondent an additional $500.

Between November 2017 and August 2018, the respondent did not communicate with the client. On or about August 19, 2018, the client contacted the respondent and the respondent asked the client to notify him when he was ready to proceed with the divorce.

Between August 24, 2018, and October 26, 2019, the respondent and the client did not communicate. On October 18, 2019, the client paid the respondent an additional $3,000.

In February 2020, the respondent accepted a position at a government agency to begin in March 2020, which prohibited the respondent from representing private clients. The respondent closed his law practice but failed to notify the client that he could not continue the representation. The respondent did not send the client a final bill or an accounting of the client's funds, did not return the client's file, and did not refund the unearned fee.

Around February 8, 2021, the client contacted the respondent and the respondent notified the client that he could not continue the representation. On March 1, 2021, the respondent notified the client that he could not locate the client's file and would refund at least a portion of the fee. Between February 8, 2021, and May 3, 2021, the client contacted the respondent every week to request a refund of the unearned fee. In January 2023, after the client had filed a complaint with Bar Counsel, the respondent refunded the entire fee. The client suffered no long-term harm from the respondent's misconduct.

There were neither aggravating nor mitigating circumstances.

By failing to represent his client with reasonable diligence and promptness, the respondent violated Mass. R. Prof. C. 1.3. By failing to keep his client reasonably informed about the status of the case and respond to the client's requests for information, the respondent violated Mass. R. Prof. C. 1.4. By failing to provide a written fee agreement, the respondent violated Mass. R. Prof. C. 1.5. By failing to retain his client's file for six years after completion of the matter, the respondent violated Mass. R. Prof. C. 1.15A. By failing, after the termination of the representation, to take steps to protect his client's interests, the respondent violated Mass. R. Prof. C. 1.16(d).

This matter came before the Board of Bar Overseers by a stipulation of the parties and a joint agreement to recommend discipline in the form of a public reprimand with the condition of participation with Lawyers Concerned for Lawyers. On February 13, 2023, the Board of Bar Overseers voted to administer a public reprimand with the agreed-upon condition to the respondent.

BAR DISCIPLINE

Contact Henriette Campagne at hcampagne@lawyersweekly.com

SJC No. 2015-058
In re: Stephen Martin Gilpatric
80 Webster Ave., Apt. 4M
Somerville, MA 02143

Judgment (reinstatement) entered by Justice Lowy on March 23, 2023

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SJC No. 2021-034
In re: Erwin Rosenberg
1000 East Island Blvd., #1011
Aventura, FL 33160

Judgment (after rescript affirmed) entered by Justice Georges on March 28, 2023

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SJC No. 2019-007
In re: Joseph Patrick Fingliss Jr.
10 Dawn's Terrace
Somerset, MA 02726

Judgment (reinstatement) entered by Justice Gaziano on March 31, 2023

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SJC No. 2022-080
In re: Benjamin B. Tariri
15 Court Square
Boston, MA 02108

Order (contempt) entered by Justice Georges on March 31, 2023

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SJC No. 2023-023
In re: Elizabeth Beringer
P.O. Box 29
North Hatfield, MA 01066-0029

Order (administrative suspension) entered by Justice Budd on March 16, 2023

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SJC No. 2023-019
In re: John J. Manning
2 Granite Ave., Suite 400
Milton, MA 02186

Order (term suspension) entered by Justice Kafker on March 30, 2023

The respondent was suspended for six months, effective immediately, for varied misconduct in three matters, including numerous intentional misrepresentations to his employers, clients and others.

Summary

The respondent and bar counsel stipulated to misconduct in three matters. The respondent was an associate in a well-known medical malpractice firm. He was administratively suspended on December 13, 2019 for failure to file an annual registration statement, and has not been reinstated to practice.

In Count 1, the respondent disobeyed instructions of his supervisors to send a letter to potential clients, advising them that the firm had decided not to represent them in a malpractice case resulting in death. Instead of sending the letter, the respondent continued to work on the matter, intentionally misrepresenting to his employer that he had sent the clients a closing letter; intentionally misrepresenting to the clients that his firm was continuing to represent them; failing, after the firm terminated him, to notify the clients that he had been terminated and would no longer be working on their matter; and both failing to notify the firm about the status of the matter during his departure, and failing to respond to the firm's post-departure questions about the file. The clients had time to retain new counsel before the statute of limitations expired.

In Count 2, the respondent met with clients about a potential medical malpractice case. A fee agreement was signed, and medical authorizations were signed and returned to the firm. Contrary to the firm's policy and practice, the respondent failed to open the file in the firm's case management system. For two years, until he was fired, the respondent falsely led the clients to believe he was in the process of requesting and receiving medical records from the medical providers and evaluating the merits of his case. The respondent never requested or obtained medical records, or did any work of substance to evaluate the case. After he was fired, the respondent never told the clients that he was no longer employed by the firm, that he would no longer be working on the matter, or that they had no legal representation. After the respondent was fired, the firm discovered his misconduct in the matter and filed suit on the clients' behalf.

In Count 3, the respondent evaluated a potential case that was referred to the firm. After the firm rejected the matter, the respondent verbally notified the potential client.

However, he never told the referring law firm of the rejection of that matter. A year later, the referring firm asked to review the file in this matter as part of an audit of matters that had been referred to the respondent's firm. The respondent could not locate the file. Instead, he met with the referring firm's lawyer and assured him he was actively working on the case and planned to file suit, and that he was looking for a better expert. All of these statements were knowingly false.

In mitigation, the parties offered that the respondent was inexperienced and under significant pressure at his job; that he did not personally benefit from his misrepresentations; that he was unfamiliar with complex medical terminology; and that he suffered from major depression and had a general anxiety disorder which negatively impacted and complicated his legal practice but was untreated at the time of the events. The respondent voluntarily consulted with Lawyers Concerned for Lawyers and had followed through with their recommendations for continued mental health treatment. The parties explained their agreement to recommend a reinstatement hearing by noting that it was intended to ensure that the respondent's mental health issues were addressed and that he would be fit to resume practice upon readmission.

By voted dated February 13, 2023, the Board of Bar Overseers recommended to the S.J.C. that the respondent be suspended from practice for six months, and that he be required to petition for reinstatement. By Order dated March 30, 2023, Justice Kafker ordered a six-month suspension, effective immediately, with the requirement that the respondent be required to petition for reinstatement pursuant to S.J.C. Rule 4:01, § 18(4) and (5), and that he comply with the December 13, 2019 Judgment of Administration Suspension.

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SJC No. 2022-055
In re: James Hayes
82 Otis St., Unit One
Cambridge, MA 02141

Judgment (disbarment) entered by Justice Georges on Feb. 14, 2023, with an effective date of March 16, 2023

The respondent was disbarred for varied misconduct in connection with a vulnerable client's lottery winnings, including intentional misuse of client funds consisting of excessive, fraudulent legal fees, and a wide-ranging fraudulent scheme.

Summary

The respondent was found to have violated numerous Rules of Professional Conduct, captured in a four-count petition for discipline: fraud on two Courts; violation of Court Orders; mishandling and misuse of client funds; and additional dishonest conduct. The facts reflect that the respondent preyed on an unsophisticated, poorly educated and mentally compromised client, who had had the good fortune to win the lottery. The respondent masterminded a scheme whereby the winnings would be concealed from the client's ex-wife and the mother of his three children who, as the respondent well knew, had secured a Probate Court order prohibiting the client from spending, transferring, assigning, pledging, or in any other way disposing of the lottery winnings. The respondent advised the client to conceal his winnings from his children's mother by claiming, falsely, that he had had a prior verbal agreement to share the money on a 50/50 basis. He created trusts to help hide the client's winnings. He proposed a groundless bankruptcy action. He got his client to give him a power of attorney, with the authority to make all financial and legal decisions for him. In reliance on a predatory, oppressive fee agreement he had drafted and neglected to explain, he paid himself clearly excessive legal fees: $85,959,92 for services worth significantly less, refunding only about $1,750 to cause the client to withdraw his first complaint to the Office of Bar Counsel.

There were no factors in mitigation. In aggravation, the respondent committed multiple rule violations; the client was vulnerable; the misconduct caused harm; the respondent had a selfish financial motive; he exhibited a lack of candor; and he failed to accept the seriousness of his misconduct, instead blaming others.

The single justice found disbarment appropriate under either of two distinct legal theories. First, it was supported by bar discipline cases prescribing disbarment for the intentional misuse of client funds, with deprivation, even where the funds at issue were excessive and fraudulent fees that the lawyer could not in good faith believe had been earned. Alternatively, it was supported by a line of cases imposing disbarment for wide-ranging misconduct in furtherance of a fraudulent scheme.

By vote dated June 13, 2023, the Board of Bar Overseers recommended that the Court disbar the respondent.

By Order dated February 14, 2023, Justice Georges ordered the respondent disbarred.

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SJC No. 2023-018
In re: Paul R. Gormley
10505 Plainview Circle
Boca Raton, FL 33498

Order (term suspension) entered by Justice Cypher on March 30, 2023, with an effective date of April 29, 2023

The respondent stipulated to a three-month suspension for repeated neglect in his handling of a guardianship / conservatorship.

Summary

In the spring of 2012, the respondent was appointed temporary guardian of an incapacitated person by the Probate Court. Thereafter, the respondent, as temporary guardian, filed a petition seeking to be appointed as his client's conservator as well. Pursuant to the court's order, the respondent was required to file an Inventory as Temporary Conservator and petition for its approval within ninety days of his appointment. He failed to do so.

The respondent was ultimately appointed permanent guardian and conservator of his client. He failed to make any of the required filings for the entire period between his appointments in 2012 and his client's death in early 2016. In early 2020, the personal representatives of the client's estate requested that the respondent provide a detailed accounting of all funds that he had held as conservator and to transfer all remaining funds to the estate. Although the respondent promptly responded to the personal representatives' initial letter, it took the respondent over two years to file all outstanding accounts and inventories and complete a final distribution of funds to the estate.

During his client's life, the respondent took possession of approximately $240,000 belonging to his client and used those funds for his client's benefit. However, the respondent used his IOLTA account to handle the funds and did not place the funds in a separate interest-bearing trust account as required. There is no allegation that the respondent misused any funds or caused any losses to the client or his estate. The respondent's conduct violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.15(c), 1.15(d)(1), and 1.15(e)(6).

In aggravation, the respondent received a public reprimand in 2019 for similar misconduct as a court-appointed conservator.

The parties filed a stipulation as to the misconduct and rules violations and jointly recommended to the Board of Bar Overseers ("Board") a three-month suspension. By vote dated February 13, 2023, the Board recommended to the S.J.C. that the respondent be suspended from practice for three months.

On March 30, 2023, Justice Cypher imposed a three-month suspension.

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

U.S. DISTRICT COURT

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Massachusetts. GURR has planned and is working on building a transloading and logistics facility on the property to support its rail operations. Hopedale meanwhile seeks to take by eminent domain a substantial portion of the property and is also trying to stop GURR's development of the property through an Enforcement Order issued by its Conservation Commission. To forestall the taking and any interference with their development plans, Plaintiffs initiated this action and argue, primarily, that both the proposed taking and the Enforcement Order are preempted by the Interstate Commerce Commission Termination Act ('ICCTA'), 49 U.S.C. §10101 *et seq*. Presently before the Court are Defendants' motion to dismiss the complaint, [ECF No. 51], and Plaintiffs' motions for a preliminary injunction to enjoin the proposed taking and any actions to carry out the Enforcement Order, [ECF Nos. 26 and 28]. For the reasons set forth below, the motion to dismiss is granted in part and denied in part, and the motions for preliminary injunction are allowed. …

"Plaintiffs argue that they are likely to succeed on the merits because Hopedale's proposed taking qualifies as a state or local action that unreasonably interferes with GURR's railroad operations at 364 West Street and is thus preempted by the ICCTA. …

"Notwithstanding the ICCTA's clear and broad preemptive sweep, Defendants argue that the proposed taking is not preempted because (1) the taking will not unreasonably interfere with GURR's operations and (2) GURR's development of the transloading facility is not far enough along to allow the conclusion that the construction will 'come to fruition.' … The question then is whether the taking is preempted even though the facility is still in the nascent stages of construction. The Court finds that it is.

"… Therefore, the Court finds that because GURR has plans for developing 364 West Street as a logistics and transloading facility, has already begun to develop the land to support that use, and has invested substantial capital in said development, the property falls under the ICCTA's definition of transportation. The Court therefore concludes that the Town's proposed taking is preempted and that Plaintiffs will likely succeed in proving that. …

"The additional factors — irreparable harm, the balance of hardships, and the effect of an injunction on the public interest — weigh in favor of allowing Plaintiffs' motion for a preliminary injunction.

"First, there is credible evidence that GURR will suffer irreparable harm if the request for a preliminary injunction is denied. … The fact that GURR would be deprived of real property, which is by itself unique and not well suited to economic damages, weighs in favor of finding that GURR would be irreparably harmed. That is especially true here where the property is of heightened value to GURR because it contains several parcels of industrially zoned land bisected by an operating railroad right of way. The Court thus finds that Plaintiffs have met their burden of showing irreparable harm. …

"Second, the combined balance of hardships and public interest factors also weigh in Plaintiffs' favor. As discussed, denying injunctive relief would almost certainly result in GURR losing title to the real property at 364 West Street and, as a result, being unable to take advantage of its unique characteristics, including that it is zoned for industrial use and bisects a railroad right of way. The loss of title would necessarily foreclose GURR's ability to continue developing the property. While the Court is sympathetic to Hopedale's interest in protecting its forest land, as of the submission of the second [Michael R.] Milanoski affidavit, much of the forest land they seek to protect has already been harvested. ... Without in any way demeaning that interest, the harm the Town seeks to prevent appears to have already occurred, thus diminishing the force of the argument. …

"For the reasons discussed herein, Defendants' motion to dismiss, [ECF No. 51], is granted in part and denied in part and Plaintiffs' motions for preliminary injunction, [ECF Nos. 26 and 28], are allowed. While the Court will retain jurisdiction over this matter, consistent with this Order, the matter will be stayed to permit the STB to consider the matter in full. To accomplish this, the Court orders Plaintiff GURR to file a Petition for Declaratory Order with the STB for the purpose of the STB issuing a declaratory order regarding the Town's proposed taking and the Conservation Commission's Enforcement Order. During the pendency of the STB proceeding, Defendants are hereby enjoined from (1) recording any notice of taking of any portion of GURR's property at 364 West Street, Hopedale, Massachusetts or (2) taking any action to enforce the Conservation Commission's Enforcement Order."

Grafton & Upton Railroad Company, et al. v. Town of Hopedale, et al. (Lawyers Weekly No. 02-159-23) (28 pages) (Burroughs, J.) (Civil Action No. 4:22-cv-40080-ADB) (March 31, 2023).

APPEALS COURT

Criminal

Responsibility – Mental impairment short of insanity

Where a District Court jury convicted a defendant of threatening to commit an assault and battery on a police officer under G.L.c. 275, §2, that conviction should be affirmed despite the defendant's argument that there was insufficient evidence produced by the commonwealth that he was criminally responsible and that the judge erred in instructing the jury on lack of criminal responsibility and mental impairment short of insanity.

"… Here, viewed in the light most favorable to the Commonwealth, the evidence would permit a rational fact finder to infer that (1) the defendant was aware of his own mental health issues when he called police to request hospitalization for a mental health evaluation hours before his confrontation with police; (2) the defendant's threats to shoot anyone who came to his door were motivated by police officers' refusal to 'get off [his] property' and 'leave [him] alone'; (3) the defendant knew that his threats and conduct toward police were wrong when he refused to leave his house despite multiple attempts by police to negotiate with him to come outside; and (4) the defendant possessed the ability to control his behavior because, while he was described as 'agitated,' 'angry,' and 'yelling' during interactions with the police, he was 'calm' when speaking with his cousin during the standoff. We are satisfied that this evidence was sufficient for a rational juror to conclude that, at the time of the offense, the defendant 'had the substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.' …

"The defense centered on the defendant's mental state at the time of the offense. The defendant requested that the judge instruct the jury on both lack of criminal responsibility and mental impairment short of insanity. He now argues that the judge combined the instructions in a manner that was confusing and may have misled the jury. We disagree. …

"Mental impairment short of insanity may bear on a person's ability to form specific intent, and thus it is relevant to crimes that require specific intent, but it is not relevant where a crime requires only general intent. … Here, no instruction on mental impairment short of insanity was required because threatening is a crime of general intent. General Laws c. 275, §2, which criminalizes 'threaten[ing] to commit a crime against the person or property of another,' does not require a specific intent that the object of the threat be placed in fear. Instead, the elements of the crime require only the general intent to communicate a threat. … Any possible flaw in the judge's instruction on mental impairment short of insanity could not have prejudiced the defendant, where he was not entitled to the instruction at all; that the judge gave the instruction provided the defendant 'more protection than the law afforded him.' *Commonwealth v. Simpson*, 434 Mass. 570, 589-590 (2001).

"Ultimately, we are satisfied that 'the judge's instructions adequately distinguished between the concepts of mental disease or defect and mental impairment,' … and provided the jury with sufficient guidance on when and how to apply each concept, without confusing the two. Although instructing the jury on mental impairment short of insanity was error, the defendant has failed to demonstrate a substantial risk of a miscarriage of justice. …"

Commonwealth v. Mcgillivary (Lawyers Weekly No. 11-042-23) (11 pages) (Brennan, J.) The case was tried before Mary F. McCabe, J., in District Court. Adriana Contartese for the defendant on appeal; Kayla Johnson for the commonwealth (Docket No. 21-P-679) (April 19, 2023).

APPEALS COURT (UNPUBLISHED)

Following are the summaries of decisions issued by the Appeals Court pursuant to Rule 23.0 (formerly known as Rule 1:28). In reporting these unpublished decisions, Massachusetts Lawyers Weekly reminds readers that the decisions may be cited for their persuasive value but not as binding precedent. The full text of these decisions can be found on Lawyers Weekly's website, masslawyersweekly.com.

Arbitration

Wage Act – Equitable estoppel

Where a Superior Court judge refused to compel arbitration of claims that the defendants violated state wage laws and failed to pay the plaintiffs fully for work performed, that decision must be vacated to the extent that it was based on the judge's incorrect understanding that the claims against two of the defendants had been settled.

"The defendants jointly appeal from an order of a Superior Court judge that refused to compel arbitration of the plaintiffs' claims. In July 2019, the plaintiffs filed a class action complaint, alleging that the various defendants violated Massachusetts wage laws and failed to pay the plaintiffs fully for work performed. As set forth in the complaint, the defendants fall into two groups: (1) the defendants Boss Enterprises and Kuralay Bekbossynova (the Boss defendants), with whom the plaintiffs had a written employment agreement that contained an arbitration clause, and (2) defendants Assurance Wireless of South Carolina and Sprint Corporation (collectively, Sprint), with whom the plaintiffs did not have a written agreement but whom the plaintiffs allege were also their employer. The judge denied arbitration as to the Boss defendants on the ground that the motion was moot, due to his (incorrect) understanding that the claims as to Boss had been settled. He denied arbitration as to Sprint because Sprint was a nonsignatory to the arbitration agreement, and because in light of the nature of the plaintiffs' claims, Sprint could not compel arbitration under a theory of equitable estoppel. For the following reasons, we affirm the denial of the motion as to Sprint, although arbitration is appropriate as to the Boss defendants. …

"All parties agree that Sprint was not a party to the employment agreements or the incorporated arbitration agreements. The defendants argue that despite this, the judge erred in denying their motion to compel arbitration as to Sprint for two reasons. First, they argue that the judge erred in concluding that the doctrine of equitable estoppel did not apply in this case. Second, they contend that the judge based his decision on an untrue fact: that Boss and Bekbossynova had settled with the plaintiffs. …

"… While we recognize that the claims against the Boss defendants and the claims against Sprint will have some overlap of witnesses and evidence, that is not the test for whether a nonsignatory to an arbitration agreement can compel arbitration. A plaintiff who did not enter an arbitration agreement with another party should not be forced to arbitrate their separate and distinct claims against that party. Here the plaintiffs have treated the defendants differently for substantive reasons, and equitable estoppel does not bind the plaintiffs to arbitrate their claims against Sprint in this case. …

"All parties agree that the judge's factual finding that that 'plaintiffs settled their claims against Boss and Bekbossynova' was erroneous. The record does not support, however, the defendants' argument that the judge's ruling against Sprint as to the motion to compel was based on that fact. Even if it was, our review of the motion to compel is de novo and does not rely on this error. For that reason, we affirm the judge's ruling as it relates to Sprint. However, inasmuch as the plaintiffs agree that they had an express arbitration agreement with Boss, and because the plaintiffs did not settle their claims with the Boss defendants, we hold that the motion to compel as it related to the Boss defendants was not moot. Accordingly, the denial of the motion to compel arbitration as to the Boss defendants was in error and must be reversed. …

"So much of the order as denied the motion to compel arbitration as to the defendants Assurance Wireless of South Carolina, LLC, and Sprint Corporation is affirmed. So much of the order as denied the motion to compel arbitration as to the defendants Boss Enterprises, Inc. and Kuralay

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Google agent not only way to authenticate images

Continued from page 1

provide evidence of the operating capabilities or condition of the equipment used by Google," the plaintiff wrote in his motion.

But in their response, the defendants pointed out that there was a key difference between the *Kane* case and theirs: The Kanes were seeking to use Google-derived photographs of a driveway that had been taken before they bought the property and thus could not use the standard procedure — their personal knowledge — to authenticate them.

In assessing the plaintiff's motion, Judge Robert B. Foster found that there was little guidance in Massachusetts case law on the admissibility of and process for authenticating Google Earth photographs and Google Maps, so he looked to case law in other jurisdictions.

A key factor for courts is the purpose for which the Google photo is being offered, Foster determined.

"Generally, in other states, when the purpose of the Google photo is to identify a property's general characteristics or its general location, the authentication requirements are the same as for a regular photograph," he wrote.

"If the purpose of the Google photo is more specific than confirming the general location or characteristics of a property — if, for example, the photograph is being used to identify a specific characteristic of land at a single point in time, or to measure the distance between the land and some other landmark — additional authentication may be required," he continued.

Similarly, sufficient authentication of the photographs the defendants were seeking to introduce in *Raccuia* "will largely depend on what the photographs are used for," Foster said.

"While the way the Chens will need to authenticate any Google photos they seek to admit into evidence cannot be known until the purpose of the photographs and maps is disclosed, Google Earth photographs, Google Maps, and aerial photographs generally can all be effectively authenticated," Foster wrote.

The seven-page decision in *Raccuia v. Chen, et al.* is Lawyers Weekly No. 14-040-23. The full text of the ruling can be found at masslawyersweekly.com.

More probative than prejudicial

The defendants' attorney, Rebecca H. Newman of Boston, said this is likely to continue to be a developing area of the law, especially as Google's archive of photographic information grows.

But it would be a real detriment to litigants — whether in a matter involving real estate, like *Raccuia*, a criminal case or a car accident resulting in property damage — not to be able to use Google images, given that the probative value of such evidence will generally outweigh its prejudicial effect, she said.

"Having the ability to use them should not be thwarted by technical evidentiary questions," Newman said. "As long as you follow the framework established for authentication, the same rules should apply."

Beverly attorney Daniel K. Gelb noted that some courts have recognized that it might pose a logistical challenge to wait to see how and why a litigant offers an online-generated image before grappling with it.

New York, for example, recently amended its Civil Practice Law and Rules to require a party intending to offer a map or image generated by a web-based service into evidence to give notice to the opposing party at least 30 days in advance of the hearing or trial specifying the internet address for inspection.

The other party then must make any objection to its admissibility at least 10 days before the hearing or trial. If no objection is made, the court takes judicial notice of the image and admits it into evidence.

"As for criminal cases, a wait-and-see approach to how the prosecution will offer the image and any assertions made by it could also have Confrontation Clause implications," Gelb said.

Newman said she uses Google Maps all the time, particularly in real estate cases.

"With adverse possession cases, they change the game," she said.

As the law evolves in this area, courts are likely to continue to acknowledge a distinction between Google Earth images, which are generated by satellite without human involvement, and "street view" images taken by workers driving around in company vehicles, which adds the potential for human error into the mix.

The latter "will be scrutinized more heavily, with just cause," Newman said.

Gelb said he agreed with the judge that the admissibility of an image from a website that produces satellite and aerial footage should depend on the purpose for which such evidence is being offered. He noted the "important difference" when an image is offered to assert a fact beyond the face of the photograph.

"Issues relate not just to establishing that the image is not altered, but whether the content may be a combination of multiple satellite or aerial captures at different points in time from different sources, using different technology and imaging tools," he said.

Northampton land use attorney Michael Pill said he, too, frequently uses aerial photographs in Land Court cases, often using historical aerial photos to show a particular location through the years, which he tends to introduce through an experienced aerial photo analyst expert.

"Some surveyors are familiar with and use aerial photographs," Pill said. "They may be helpful as experts in getting such photos admitted into evidence."

The state also maintains an online database of historical aerial photos, the "MassGIS Imagery Time Series," which may be considered admissible as public records under G.L.c. 233, §79A, Pill said.

While §79A seems to require certification, Pill said he has never been challenged when authenticating such documents — including Google Earth and MassGIS aerial photos — with his own affidavit attesting to the fact that the documents are true, accurate and complete copies that he had downloaded personally.

The plaintiff's attorney, Gregory J. Aceto, had not responded to requests for comment as of Lawyers Weekly's press time.

Fence removal sought

Plaintiff Philip Raccuia is the trustee of the Nicholas Realty Trust. The trust owns 838-840 Huntington St. in Boston, which is situated adjacent to 842-844 Huntington St., owned by defendants Cynthia Mei Chen and Jun Rong Chen.

On Aug. 10, 2020, Raccuia filed a complaint in Land Court seeking, among other things, a temporary restraining order requiring the Chens to remove a chain-link fence that they had erected, which he claims is blocking fire egress from his property.

There is a pathway approximately 4 feet wide that includes a concrete staircase on the Chens' property alongside the western wall of Raccuia's property. The pathway runs between a gate in an existing wooden fence along the Chens' property and the rear of the building, where a wooden staircase leads to a door at the rear of Raccuia's building.

For all 22 years his trust has owned the property, the pathway, including both the concrete and wooden staircases, have been there, Raccuia alleges.

There is no express easement between the plaintiff's trust and the defendants regarding use of the pathway and concrete stairs. But throughout the trust's ownership of the property, residents of 838-840 Huntington have regularly used and relied upon access to the pathway and staircase, according to Raccuia.

Raccuia is claiming an easement by prescription or, alternatively, an easement by implication on the Chens' property, given the longstanding use that has been "continuous, open, notorious" and adverse to the defendants' interest.

As part of the ensuing litigation, the Chens proposed to use aerial Google Earth images from 12 different dates over the course of 16 years to confirm the existence and appearance of a fence situated on their parcel and a dirt mound in the area, which they believed would be "particularly helpful," given that the existence and appearance of the fence "goes to the heart" of Raccuia's easement claims. It would be highly prejudicial to them to exclude the photos, they argued.

The Chens said the photos would also show that it was "unlikely, if not wholly impossible," for tenants in Raccuia's buildings to have used the strip at issue to carry furniture in and out of the building, as alleged.

Other ways to authenticate

Even if a party cannot authenticate a Google photo using personal knowledge, alternatively that party could offer proof that the Google photo is "computer-generated and required no human participation in its creation," Foster wrote.

He pointed out that the Supreme Judicial Court, in the 2021 case *Commonwealth v. Davis*, held that computer-generated maps are not hearsay.

"If a party can prove that a Google photo is computer-generated, this proof will not be hearsay and can therefore be used as an alternative form of authentication," Foster wrote.

If the Chens were planning to use the photographs merely to prove that the fence had been on the parcel consistently throughout the 16 years they had owned the property, it was likely that "the most basic form of authentication" — testimony of a witness with personal knowledge of what is represented in the photograph — would likely be sufficient, Foster said.

If they sought to use the photographs to prove something beyond what the images show, additional evidence would be required.

Even though other courts often require testimony of an expert or person familiar with the system that created the digital evidence, offering proof that the Google photo was computer-generated without human participation could help the Chens meet their burden, Foster said.

"Alternatively, confirming circumstances such as independent photographs taken by the residents from that time period or witness testimony about the general appearance of the parcel during that time period may be sufficient to authenticate the photograph," Foster wrote. MLW

Raccuia v. Chen, et al.

THE ISSUE	Is testimony from an agent of Google or its affiliates the only way to authenticate a series of aerial Google Earth images intended to be introduced as evidence at trial?
DECISION	No (Land Court)
LAWYERS	Gregory J. Aceto and Michael B. Cole, of Aceto, Bonner & Cole, Boston (plaintiffs) Rebecca H. Newman of Newman & Newman, Boston (defense)

> Having the ability to use [Google images] should not be thwarted by technical evidentiary questions. As long as you follow the framework established for authentication, the same rules should apply.
>
> — Rebecca H. Newman, Boston

Sheriff's Office facing liability for inmate's suicide

Continued from page 1

Corrections following a burglary arrest in 2014, she told her intake nurse that she suffered from bipolar disorder, anxiety and drug addiction.

The nurse, who worked for the Sheriff's Office's health care contractor, ordered a psychiatric exam, but Prado apparently never received one, even after she was placed in solitary confinement for smuggling drugs into the facility and shortly thereafter was found with a torn bedsheet.

Additionally, medical staff did not share medical and mental health records with corrections staff, which allegedly would have flagged Prado as a suicide risk.

Three days later, Prado hanged herself with a length of bedsheet from a bunk in her cell.

Prado's estate sued the Sheriff's Office and the commonwealth under the state wrongful death statute and the Massachusetts Tort Claims Act.

In a motion to dismiss, the defendants asserted discretionary immunity under G.L.c. 258, §10(b), which insulates public employers and employees from liability for the carrying out of previously established policies. They also claimed "original cause" immunity under G.L.c. 258, §10(j), which shields public entities from liability for failing to prevent harm from a privately created hazard.

Judge Michael P. Doolin denied the motion, pointing to the lack of training by the Sheriff's Office's medical director, the department's failure to coordinate sharing of health care information, and its use of beds in solitary confinement that posed a suicide hazard.

Prado v. Hodgson, et al.

THE ISSUE Could the estate of a pretrial detainee who hung herself while in solitary confinement bring a negligence action against the commonwealth and the Bristol County Sheriff's Office?

DECISION Yes (Suffolk Superior Court)

LAWYERS Mark F. Itzkowitz of Boston (plaintiff)
John D. Hampton and Hannah B. Pappenheim, Attorney General's Office, Boston (defense)

"For at least these reasons, the discretionary immunity statute does not bar liability here," Doolin wrote.

As for "original cause" immunity, "the BCSO took affirmative action when it placed Ms. Prado in segregation and strip searched her multiple times, all without the mental health examination she was prescribed during intake," Doolin continued. "Further, when BCSO officers discovered Ms. Prado with a torn sheet in solitary confinement, creating a kind of fabric rope, the BCSO had reason to suspect that Ms. Prado could pose a suicide risk."

Prado's attorney, Mark F. Itzkowitz of Boston, said it is the first case he is aware of seeking to hold a prison accountable for institutional negligence at a higher level, rather than for misconduct of a particular corrections officer.

"A prison can no longer escape liability by saying it's the officer's fault," he said. "Now they have to look at how they're implementing decisions globally at a higher level of prison oversight."

David Milton, a senior staff attorney with Prisoners' Legal Services of Massachusetts, said the decision sends a message that solitary confinement is dangerous, and jails should not have immunity for failing to prevent the suicides of people placed there.

"The decision really gets to the heart of the matter, which is that the sheriff's department was negligent in a number of respects, both at the level of implementing policy and in the actions of individual officers," said Milton, who was not involved in the case.

A spokesman for the Attorney General's Office, which represents the defendants, declined to comment.

The 11-page decision is *Prado v. Hodgson, et al.*, Lawyers Weekly No. 12-015-23. The full text of the ruling can be found at masslawyersweekly.com.

Tragic confinement

Prado was arrested on Sept. 5, 2014, for breaking and entering, vandalism and drug possession.

On Sept. 8, she was transferred to the Bristol County House of Corrections as a pretrial detainee.

Prado's intake was completed by a nurse employed by Correctional Psychiatric Services, the health care contractor of the Sheriff's Office.

During the intake, Prado told the nurse she had bipolar disorder but was not taking prescribed medications; that she was a heroin user who had not detoxed; and that she had been hospitalized recently for mental health treatment and substance abuse.

The nurse referred Prado for a mental health evaluation, which she never received.

Meanwhile, intake and medical records from a prior incarceration several months earlier were apparently available to CPS staff, including the intake nurse, but not to the Sheriff's Office staff due to prohibitions in CPS and Sheriff's Office policies.

On Sept. 9, corrections officers learned Prado had smuggled drugs into the facility and shared them with cellmates the night before.

A search of Prado's cell turned up eight bags of heroin. A strip and body cavity search turned up more drugs. Prado was then placed under "drug eyeball watch" by corrections officers.

Prado was subsequently cleared for solitary confinement, though the nurse conducting the required medical assessment at that point apparently did not review Prado's medical chart or intake evaluations and was not told the reason for Prado's segregation.

Eight minutes after Prado's transfer to solitary, the officer on duty found her in possession of a torn bedsheet and wrote up a disciplinary report, but Prado was not referred for a mental health evaluation.

On Sept. 11, a nurse checked on Prado in segregation. She did not review Prado's charts beforehand, though she did ask Prado if she needed any medical, dental or mental health services, to which Prado responded in the negative.

The next morning, Prado was found hanging in her room and was pronounced dead after being transferred to the hospital.

Prado's father, plaintiff David Prado, sued the commonwealth and the Sheriff's Office in his capacity as personal representative for her estate.

The defendants moved to dismiss on immunity grounds.

No immunity

Dooling rejected the assertions of immunity.

"While the question is close, because the discretionary immunity statute limits its immunity to the 'carrying out of previously established policies or plans,' BCSO's alleged negligent implementation of 'previously established policies or plans' here is not protected," Dooling said, quoting *Barnett v. Lynn*, a 2001 Supreme Judicial Court decision.

Specifically, he stated that the employment of a medical director without clinical training, the failure to coordinate critical information-sharing between medical and correctional workers, and the use of beds that constituted an allegedly known suicide risk could be deemed negligent implementation of existing policies not covered by the statute.

Similarly, he rejected the defendants' argument that because Prado committed suicide, the Sheriff's Office could not have been the "original cause" of her harm, instead finding that the department's affirmative acts both at the higher levels related to negligent implementation of suicide prevention policies and at the lower levels related to Prado's treatment could have contributed to her death.

"Considering the foregoing, the BCSO and the Commonwealth are not entitled to judgment as a matter of law," the judge concluded.

Helpful decision

Local attorneys applauded the decision.

"We are pleased that the Superior Court has signaled the lack of coordination between the sheriff department and its medical vendor as potentially negligent conduct not covered by §10(b) discretionary immunity," said Jennifer Honig, co-director for public policy and government relations at the Massachusetts Association for Mental Health in Boston. "This is important, because most of the medical care in the state's prisons and jails is provided by private companies."

Honig was similarly pleased by the court's refusal to apply original cause immunity.

"Although it seems obvious that such omissions contribute to the harm from completed or attempted suicides, and that direct care staff can prevent it, it is both important and refreshing to have the judge say so in this decision," she said.

Phillip J. Kassel, executive director of the Mental Health Legal Advisors Committee in Quincy, said the court correctly determined that an agency has no discretion to be negligent in discharge of its own policies.

He also said Prado's segregation and multiple strip searches represented "extreme callousness."

Boston civil rights attorney Michael L. Tumposky said the case reinforces the need for dramatic reform in how jails handle mental health issues at a policy level.

"It also speaks for the need to fix the Massachusetts Tort Claims Act, which is old and confusing," he said. MLW

SJC to decide heirs' fight to void pet trust provision

Continued from page 1

the Probate & Family Court's Fiduciary Litigation Session, rejected the heirs' arguments in a pair of rulings.

In a decision on Sept. 15, 2020, Moriarty granted partial summary judgment to the petitioner on the question of whether the remainder provision of the pet trust had failed as a matter of law, leaving the estate to pass to Theresa's heirs.

"The Testatrix provided for no gift over in the event that the pet predeceased the Testatrix or if the trust were found to be invalid," Moriarty wrote. "In fact, the Will specifically provided for any lapsed gifts to pass to the trust (Article IV). Reading the will as a whole, the Testatrix's intent to devise any remaining trust funds to charity is clear and shall be given effect under the doctrine of acceleration of remainders."

On Dec. 21, 2021, Moriarty entered findings of fact and conclusions of law following a trial held on the other issues in the case. She entered judgment for petitioner Ann Jablonski on the objectors' contention that Ann exercised undue influence over Theresa. Accordingly, the court entered a final decree approving the will and appointing the petitioner as personal representative of Theresa's estate.

Upon the objectors' appeal, the SJC exercised its authority to transfer the case from the Appeals Court, soliciting amicus briefs on a discrete issue: "Whether the trial judge properly concluded that, although the sole bequest in the decedent's will — a pet trust provision pursuant to G.L.c. 203E, §408 — failed where the decedent had no living pets at the time of her death, the charitable remainder portion of the trust provision was nonetheless enforceable pursuant to the doctrine of acceleration of remainders; or whether the charitable remainder portion of the trust provision also failed as a result of the absence of any living pets, such that the decedent's estate passed to her heirs by intestacy."

Worcester attorney Penelope A. Kathiwala, who represents the petitioner, thinks the answer to the court's question is clear given that the testator, Theresa, refused to name any beneficiaries aside from the charity.

"She wanted to leave the estate to charity after her pet passed on, and she did not care what charity," Kathiwala said. "Theresa would not want her estate to go by intestacy."

Washington, D.C., attorney David M. Levy represents the appellant objectors, Joseph J. Jablonski Jr., Paul A. Jablonski and Sally E. Jablonski. Levy declined to comment on the record.

But in his clients' brief, Levy took issue with the lower court's decision.

"Judge Moriarty's decision to divert Theresa's estate to charity violated a basic tenet of will construction," Levy wrote. "The bequest to the pet trust was conditioned on the survival of Theresa by at least one pet. So was the provision authorizing the trustee(s) of the pet trust to wind it down by appointing its remaining assets to charity. Because the condition was unsatisfied, the pet trust bequest and the charitable power of appointment lapsed, and the estate must pass through intestate succession."

But Leo J. Cushing, an estate planning attorney in Waltham, agrees with the lower court's decision.

"It's the right result on the law and in terms of equity, and it's the right result for the practice of estate planning and trusts," Cushing said. "I think it will be upheld for sure."

Pet trust

According to court records, the petitioner and three objectors are nieces or nephews of the testatrix, Theresa. A longtime resident of Worcester, Theresa was 83 when she died in 2019.

Theresa never married and had no children. None of Theresa's parents or siblings were alive at the time of her death. And while the petitioner and the three objectors were Theresa's only surviving next of kin, Theresa's will left nothing to the heirs.

Kathiwala said Theresa's estate consisted primarily of her home in Worcester. Estimating that Theresa's estate had a current value of less than $500,000, Kathiwala noted that her assets had been diminished by the costs of her assisted living and long-term care situations in the years leading up to her death.

"That substantially eroded her estate," Kathiwala said. "She was left with her house and some cash, but not a lot."

When Theresa executed her will in 2013, Licorice, a jet-black cocker spaniel, was already about 15. The petitioner's attorney at the time, Wayne P. Tupper of Worcester, prepared Theresa's will, which devised the entire estate, after payment of debts, to the "Licorice Testamentary Trust."

The Legislature enacted the state's pet trust statute, G.L.c. 203E, §408, in 2011. Section 408(a) specifically provides that a "trust for the care of animals alive during the settlor's lifetime shall be valid. Unless the trust instrument provides for an earlier termination, the trust shall terminate upon the death of the animal or, if the trust was created to provide for the care of more than 1 animal alive during the settlor's lifetime, upon the death of last surviving animal."

Theresa's will asserted that the Licorice Testamentary Trust was a pet trust in conformity with the statute. In addition to the will providing that the trust would benefit Licorice as well as any other pets in Theresa's possession at the time of her death, it included a provision stating that, after the death of all beneficiaries, trustees "shall have the power and authority to designate a charity to receive the remainder of any and all such funds that shall be in their possession, custody or control."

Article IV of the will included a residuary clause providing "all lapsed legacies and devises or other gifts made by this Will which fail for any reason" go in trust to the trustees of the Licorice trust.

Licorice was euthanized in 2017, and Theresa died without making any changes to her 2013 will.

In ordering partial summary judgment on the issue of whether the trust's remainder provision should be given effect, Moriarty noted that there was no Massachusetts authority interpreting G.L.c. 203E, §408(a). She did cite to Texas case law for the proposition that a pet trust failed when no beneficiary pet was alive at the time of the settlor's death.

Turning to the case at hand, Moriarty held that the Licorice trust likewise failed because there was no pet living at the time of Theresa's death.

Nonetheless, Moriarty ruled that the Licorice trust charitable remainder provision could be given effect under the doctrine of acceleration of remainders, a principle recognized in Massachusetts and elsewhere generally providing that invalidation of a trust can trigger giving immediate effect to remainder interests.

"Courts in New York and California have held that a charitable remainder provision following an invalid pet trust provision should be given effect," Moriarty wrote.

The fact that the terms of the trust failed to name specific charities did not alter her decision to enforce the charitable remainder clause, Moriarty said.

"The failure to name specific charities to receive the remainder does not invalidate the gift," she wrote, citing longstanding Massachusetts precedent.

Why this case?

Speculating on why the SJC took the case, Kathiwala suggested the court may want to speak to the issue of acceleration of remainders.

"And they may want to say something about the global construction of a will and the intention of the testator," she said. "In reading the case law from across the country, courts do not find that a testator who makes a bequest intend for their estate to go intestate."

Cushing suggested that the SJC may have an interest in the case because the state's pet trust law is relatively new and there is little case law on the subject.

Meanwhile, Jonathan M. White, an estate planning attorney in Danvers, said he sees a healthy demand for pet trusts from his clients.

"It's an opportunity to add to an estate planning portfolio, and on the North Shore, there seems to be a love for dogs," White said. "When you're creating [a client's] plan and you mention that they can specifically provide for their pet, a lot of dog owners in my practice jump at the opportunity."

Betting on affirmance?

As of press time, no amicus parties had filed briefs in the case. But the consensus of attorneys who spoke with Lawyers Weekly is that Moriarty's decision should be affirmed.

"The most important component of any [estate] plan is the decedent's intent," Cushing said. "[Here,] it's clear that the intent was to exclude the [heirs] and benefit the charities."

White, too, thinks Moriarty made the right call in *Jablonski*.

"You can clearly see from the four corners of the will that [the testatrix] intended everything flowing to the pet trust and then, when that pet trust expired, flow out to charities that her trustee would pick," White said. "There was nothing in that will that indicated anything other than that was the plan she wanted."

Framingham attorney Mark W. Worthington, a past president of the Massachusetts chapter of the National Academy of Elder Law Attorneys, said while he agreed with the result, he disagreed with Moriarty's ruling insofar as the judge found that the trust had been rendered invalid.

"Section 408 uses the unfortunate language that the trust terminates [when the pet dies]," Worthington said. "That's not really correct. It's not a pet trust, but it's still a trust and you've got a remainderman. I almost don't care if the SJC doesn't agree with me on my approach, but I do care if they agree on the result. The intestate heirs should take nothing."

Meanwhile, White views the case as offering a practice tip for the bar.

"Estate planning attorneys who just write up estate plans and then don't follow up with the client are missing opportunities to grow a client relationship," White said. "If you're checking in regularly with your client, you'll know if something has changed, and there's a need to amend their document so that it works right." MLW

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APPEALS COURT (UNPUBLISHED)

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Bekbossynova is reversed. The matter is remanded to the Superior Court for further proceedings consistent with this decision."

DiPlacido, et al. v. Assurance Wireless of South Carolina, LLC, et al. (Lawyers Weekly No. 81-034-23) (8 pages) (Docket No. 22-P-950) (April 21, 2023).

Attorneys

Malpractice – Limitations

Where summary judgment was awarded to defendant attorneys in a malpractice action, that judgment should be upheld because (1) the judge properly determined that the plaintiff's breach of contract claim was subject to the three-year statute of limitations for malpractice actions and (2) the defendants' allegedly negligent preparation of a motion for a new trial did not constitute a separate "unknowable" act of post-trial malpractice.

"Duane Alves (plaintiff) was seriously injured in a bar fight. He retained Cohan and Plaut (with others, the attorney defendants,) to represent him in a civil action for damages; they also defended him in a related action. After losing both cases, the plaintiff brought this malpractice action against the attorney defendants. The judge ruled that the plaintiff's claims for malpractice, breach of contract, and violation of G.L.c. 93A were barred by the applicable statutes of limitations and awarded summary judgment to the attorney defendants. We affirm. …

"'Actions of contract or tort for malpractice, error or mistake against attorneys . . . shall be commenced only within three years next after the cause of action accrues.' G.L.c. 260, §4. …

"… Because the plaintiff's breach of contract claim was based on the attorney defendants' conduct under the agreement, the judge properly determined that it was subject to the three-year statute of limitations for malpractice actions. …

"Having concluded that the plaintiff's claims sounded in malpractice, we consider the application of the statute of limitations to those claims. …

"The plaintiff's pre and postjudgment malpractice claims accrued before July 2, 2015, and thus they are barred by the three-year statute of limitations. …

"We are not persuaded that the attorney defendants' 'negligent preparation' of the motion for a new trial constituted a separate 'unknowable' act of posttrial malpractice. …

"'A four-year statute of limitations applies to G.L.c. 93A claims.' *Lambert v. Fleet Nat'l Bank*, 449 Mass. 119, 126 (2007). 'Under the "discovery rule," this limitations period is subject to tolling until the plaintiff knew or should have known of the alleged injury.' …

"The plaintiff alleges two violations of c. 93A, one based in contract and one in tort, arising from the attorney defendants' 'unfair and deceptive acts and omissions' throughout their representation. Because the plaintiff's contract-based c. 93A claim arises from the same set of facts supporting his breach of contract claim, the accrual date for those claims was also March 2014, when he was harmed by being coerced into signing the modified contract and paying a $10,000 additional fee. … The c. 93A contract claim was therefore barred by the four-year statute of limitations.

"Similarly, the plaintiff's malpractice-based c. 93A claim amounts to a recasting of his legal malpractice claim. Thus, it is subject to, and barred by, the three-year statute of limitations for negligence claims. …"

Alves v. Cohan, et al. (Lawyers Weekly No. 81-032-23) (12 pages) (Docket No. 22-P-720) (April 12, 2023).

Civil practice

Fraud on the court – Discovery

Where a plaintiff filed a motion to impose sanction and to enter a finding that the defendant committed fraud on the court in relation to certain falsified discovery documents, a judge's decision to deny that motion should be affirmed because there was no error in the judge's finding that the falsified discovery did not hamper the plaintiff's ability to present her claims.

"Heidi and Brian Hache brought a negligence action against Wachusett Mountain Ski Area, Inc. (Wachusett), after their son fell from a ski lift operated by Wachusett. Following a $3.275 million jury verdict in her favor, Hache filed a motion asking the trial judge to enter a finding that Wachusett committed fraud on the court in relation to certain falsified discovery documents and to impose sanctions. …

"Here, the judge was within her discretion to conclude that Hache did not meet her burden of proving fraud on the court. … The judge, who was well familiar with the case, found that 'the falsified discovery did not impact the court's adjudication' or 'cause it to unnecessarily expend time or resources uncovering the deception.' This finding was squarely within the judge's discretion. Indeed, Hache does not challenge it on appeal.

"Hache does challenge, as clearly erroneous, the judge's finding that the falsified discovery did not hamper Hache's ability to present her claims. We see no error. … The fraud, in other words, was not of the type involving 'a corruption of the judicial process itself.' …

"… Hache does not cite any case that has applied the concept of ratification in the context of fraud on the court, but, even assuming the concept has a part in the analysis, the judge properly found that no ratification occurred. … More importantly, regardless of whether there was ratification,

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the judge correctly recognized that, for there to be fraud on the court, the underlying inquiry is whether the fraud interfered with the court's adjudication or hampered the presentation of the opposing party's case. For the reasons we have stated, the judge was within her discretion in concluding that Hache failed to make this showing by clear and convincing evidence.

"The order dated March 30, 2022, denying Hache's motion for a finding of fraud on the court and for sanctions, is affirmed."

Hache, et al. v. Wachusett Mountain Ski Area, Inc. (Lawyers Weekly No. 81-035-23) (9 pages) (Docket No. 22-P-467) (April 21, 2023).

Civil practice

SDP – 'Menace'

Where a jury found a defendant to be a sexually dangerous person, the defendant is entitled to a new trial because an instruction defining the term "menace" as applied to noncontact offenses was warranted.

"After a jury trial in the Superior Court, the defendant was found to be a sexually dangerous person (SDP), and was committed to the Massachusetts Treatment Center for an indefinite period. ... On appeal, he argues that the trial judge erred in failing to give a so-called *Suave* instruction, see *Commonwealth v. Suave*, 460 Mass. 582, 588 (2011), and that the prosecutor exceeded the bounds of permissible advocacy during cross-examination of certain witnesses and, again, during closing argument. Because we agree with the defendant that the judge's instructions were insufficient, thereby entitling him to a new trial, we vacate the judgment and set aside the verdict. …

"We agree with the defendant that the outcome here is controlled by *Commonwealth v. Spring*, 94 Mass. App. Ct. 310, 324 (2018), a recent case with facts strikingly like the one at bar. …

"Here, like in *Spring*, 94 Mass. App. Ct. at 312, the Commonwealth presented evidence at trial that the defendant had a history of both contact and noncontact sex offenses — namely, possession of child pornography — with his most recent contact offense occurring over twenty years before the SDP trial. …

"In the circumstances of this case, an instruction defining the term 'menace' as applied to noncontact offenses was warranted. … This error deprived the defendant of his ability to present a meaningful defense at trial, and allowed the jury to conclude that the defendant was sexually dangerous in circumstances that do not permit such a finding. …

"… The defendant is therefore entitled to a new trial. …

"The judgment is vacated, and the verdict is set aside."

Commonwealth v. Pallas (Lawyers Weekly No. 81-036-23) (8 pages) (Docket No. 22-P-326) (April 25, 2023).

Criminal

Complaint – Credibility

Where a defendant filed a motion to dismiss, that motion should have been denied despite the defendant's suggestion that the commonwealth failed to include information in its application for criminal complaint that might have called into question the credibility of the complaining witness.

"The Commonwealth appeals from an order of the District Court, dismissing a criminal complaint against the defendant following the allowance of the defendant's motion to dismiss. We reverse in part.

"… Specifically, the defendant suggested that the Commonwealth failed to include information in its application for criminal complaint that might have called into question the credibility of the complaining witness. However, the defendant has not demonstrated that the police officer who prepared the application for complaint was aware of the information cited by the defendant. In any event, the information did not demonstrate that the evidence supporting the application was untrue; it was simply of the type that might be used, at trial, to impeach or otherwise call into question the credibility of that evidence. … It did not distort the evidence, or display an intent to deceive the magistrate. ... In a criminal complaint process, the Commonwealth does not have a duty to produce 'all available exculpatory evidence,' but only that evidence which would 'gravely undermine evidence supporting probable cause.' *Commonwealth v. Biasiucci*, 60 Mass. App. Ct. 734, 738 (2004).

"The allowance of the defendant's motion to dismiss counts two through four of the complaint was error, and the order of the District Court is accordingly reversed as to those counts. As to count one, the order is affirmed."

Commonwealth v. Melanson (Lawyers Weekly No. 81-033-23) (Docket No. 22-P-863) (April 20, 2023).

SUPERIOR COURT

Evidence

Spoliation – CCTV

Where the plaintiffs in a negligence action over an injury at the defendant's store have moved for sanctions based on the defendant's failure to preserve a video from a closed-circuit television camera located in the front of the store, the jurors should be instructed that they may infer that the defendant prevented the preservation, collection and presentation of relevant evidence out of a realization that the evidence was unfavorable.

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"All sides agree that there was a CCTV camera that was owned/controlled by Home Depot. All sides agree that it was located in the front of the store. All sides agree that the CCTV camera was operating on the evening of the incident, May 13, 2020. All sides agree that if nothing is done to preserve a recording made by the CCTV camera, it will be recorded over and lost forever. All sides agree that an agent of Home Depot, a Home Depot Operations Manager, Robert Nelson called Home Depot Operations Manager Stephanie Watts at home informing her of the incident. All sides agree that Ms. Watts saved a fifty-one second portion of that video. …

"The Court finds that Home Depot had knowledge of an extensive video that existed that captured the entire incident, from the time the TMC [Transportation] truck drove up to the unloading area, until after the EMTs and other rescue personnel arrived. Watts, an agent of Home Depot, not only knew of the existence of such a recording but accessed it on the night in question. It matters not what Watts deemed to be relevant or not. … Home Depot was aware that the tape, if it was not saved, would be rewritten over. The tape was rewritten over. All that remains is a fifty-two second excerpt, that is not as clear as the original video. Home Depot should have saved the video. …

"The spoliation in this case is indeed significant. Many of the contested issues would not be so if the recording were extant. …

"The Court holds that the jury in this case will be instructed that they may infer that Home Depot prevented the preservation, collection and presentation of relevant evidence in this case 'out of a realization that the [evidence was] unfavorable.' *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1158 (1st Cir. 1996). The Court further holds that the jury in this case will be instructed that they may make the inference that the missing video, may have demonstrated that Rodrigues was on the passenger side of the vehicle when the accident occurred. The Court further holds that at the trial of this matter, the facts and circumstances surrounding Home Depot's spoliation of evidence that might have been discovered had Home Depot appropriately collected, preserved and presented the video, may be presented to the jury."

Rodrigues, et al. v. The Home Depot, U.S.A., Inc., et al. (Lawyers Weekly No. 12-014-23) (10 pages) (Glenny, J.) (Plymouth Superior Court) (Civil Action No. 2083CV00503) (March 14, 2023).

Negligence

Immunity – Suicide

Where a wrongful death complaint has been brought over the suicide of a pretrial detainee, the discretionary immunity statute does not bar liability on the part of the Bristol County Sheriff's Office.

Accordingly, the office's motion for summary judgment is denied.

"The defendants, Thomas M. Hodgson, as Sheriff of Bristol County, in his official capacity (the Bristol County Sheriff's Office or 'BCSO'), the Commonwealth of Massachusetts (the 'Commonwealth'), Correctional Psychiatric Services, P.C. ('CPS'), and Officers Christine B. Fortin, Glenn Taber, and Bruce Duarte (the 'Officers'), have all moved for summary judgment on various counts. This matter arises from Devon Prado's incarceration and subsequent suicide in September 2014. Ms. Prado's father, David Prado, brought the present action as personal representative of the estate of Ms. Prado against each of the named defendants for their conduct leading up to Ms. Prado's suicide. For the reasons explained herein, CPS's motion for summary judgment (Paper No. 82) is denied, the BCSO and the Commonwealth's motion for summary judgment (Paper No. 87) is denied, and the Officers' motion for summary judgment (Paper No. 89) is allowed. …

"CPS has moved for summary judgment on Mr. Devon's count 16 for breach of contract/third party liability. In support thereof, CPS argues that Mr. Devon's breach of contract claim is duplicative of Mr. Devon's wrongful death claim and thus must be dismissed. CPS further argues that there is no basis for third-party beneficiary status

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SUPERIOR COURT

in this matter because Ms. Prado was not an intended beneficiary of the contract between CPS and BCSO. …

"To begin, though both Mr. Prado's wrongful death and his third-party beneficiary claims both target CPS's duty of care, they do so through distinct legal theories. Though the two claims arc closely related, Massachusetts law allows parties to pursue relief on alternative legal theories. … Here, Mr. Prado may proceed under alternate legal theories. The jury should be instructed accordingly to prevent the possibility of duplicative recovery. …

"Courts beyond the Commonwealth have held that inmates benefitting from contracts whose purpose is to provide services to inmates are third-party beneficiaries to those contracts. … Further, as Mr. Prado correctly asserts, these cases have been cited favorably by Massachusetts courts, even if they have not been adopted. … As such, the court is persuaded that CPS is not entitled to judgment as a matter of law on the plaintiff's third-party beneficiary claim. …

"The Commonwealth of Massachusetts and the BCSO have moved for summary judgment on Mr. Prado's counts for wrongful death (count 1) and conscious pain and suffering (count 2). As grounds therefore, they argue that the BCSO is immunized from suit by discretionary immunity under G.L.c. 258, §10(b) and that the BCSO is immunized from suit by G.L.c. 258, §10(j) because it was not the original cause of Ms. Prado's harm. For the reasons outlined below, BCSO's arguments fail. …

"While the question is close, because the discretionary immunity statute limits its immunity to the 'carrying out of previously established policies or plans,' … BCSO's alleged negligent implementation of 'previously established policies or plans' here is not protected. The fact that the BCSO employed a medical director who lacked clinical training may suggest negligent conduct not protected by the statute. The same argument applies to BCSO's failure to coordinate the distribution of material health care information between the BCSO and CPS and also BCSO's use of beds which presented suicide hazards. Each instance may constitute the negligent implementation of existing policies, rather than discretionary establishment of such policies. For at least these reasons, the discretionary immunity statute does not bar liability here. …

"The BCSO argues that because Ms. Prado's death was caused by suicide, the BCSO could not have been the 'original cause' of her harm, so Section 10(j) applies to bar liability. Mr. Prado responds that the affirmative acts of BCSO — both at the higher levels related to the negligent implementation of suicide prevention policies and at the lower levels relating to the treatment of Ms. Prado in the days prior to her death — contributed to Ms. Prado's suicide, so Section 10(j) does not apply to bar liability.

"Viewing the facts in the light most favorable to Mr. Prado, the claims against the BCSO are not barred by Section 10(j). The BCSO took affirmative action when it placed Ms. Prado in segregation and strip searched her multiple times, all without the mental health evaluation she was prescribed during intake. … Further, when BCSO officers discovered Ms. Prado with a tom sheet in solitary confinement, creating a kind of fabric rope, the BCSO had reason to suspect that Ms. Prado could pose a suicide risk. … Considering the foregoing, the BCSO and the Commonwealth are not entitled to judgment as a matter of law. …

"Finally, officers Christine Fortin, Glenn Taber, and Bruce Duarte (the 'Officers') move for summary judgment on Mr. Prado's claims of excessive force (count 15) and civil conspiracy (count 17). Because the plaintiff is unable to locate the only witnesses available to dispute the facts alleged by the Officers, the plaintiff docs not oppose the Officers' motion. Summary judgment will accordingly enter in favor of the Officers on those two counts."

Prado v. Hodgson, et al. (Lawyers Weekly No. 12-015-23) (11 pages) (Doolin, J.) (Suffolk Superior Court) (Civil Action No. 1784CV02900) (April 11, 2023).

SUPERIOR COURT/ BUSINESS LITIGATION SESSION

Attorneys

Side agreement – Fiduciary duties

Where a plaintiff attorney has brought a breach of contract against his former law partner, the plaintiff is entitled to summary judgment because he is owed $308,824.16 under the parties' side agreement, but summary judgment should be denied with respect to a counterclaim concerning the fiduciary duties owed during the dissolution and wind-down of the parties' law firm.

"… The Side Agreement unambiguously states that any amount owed must be paid by December 31, 2015. [Defendant Mark F.] Murphy admits that he has paid nothing on the undisputed Guaranteed Amount owed, $308,824.16. …

"Here, the record, viewed generously in Murphy's favor, contains sufficient circumstantial evidence to overcome summary judgment on the issue of the fiduciary duties owed during the dissolution and winddown of Wulsin Murphy. …"

Wulsin v. Murphy (Lawyers Weekly No. 09-034-23) (11 pages) (Kazanjian, J.) (Suffolk Superior Court) (Civil Action No. 1984CV01946-BLS1) (March 10, 2023).

Contract

Merger agreement

Where a plaintiff has brought suit alleging breach of a merger agreement, the facts alleged plausibly suggest that the plaintiff shareholders may be entitled to relief on claims for breach of contract, violation of G.L.c. 93A, and breach of the implied covenant of good faith and fair dealing, but a remaining count for breach of an implied contractual obligation must be dismissed because the defendant's express contractual obligation to use commercially reasonable efforts to develop new products displaces any implied obligation.

"Nagesh Mahanthappa asserts claims against Abbott Laboratories, Inc., on behalf of the former securityholders of TwistDx, Inc., which merged into a company that was later acquired by Abbott. At the time of the merger, TwistDx was trying to develop diagnostic tests for infectious human diseases using Recombinase Polymerase Amplification ('RPA') technology.

"Mahanthappa claims that Abbott breached obligations under the merger agreement to use commercially reasonable efforts to develop new products using RPA technology covered by any claim in certain patents held by TwistDx, and to consult with TwistDx's management before reducing or eliminating funding for its operations. He further claims that Abbott also breached the implied covenant of good faith and fair dealing, breached an implied obligation to use reasonable efforts to perform its express contractual obligations, and engaged in unfair or decepative acts or practices in trade or commerce and thereby violated G.L.c. 93A, §11. Abbott has moved to dismiss all claims.

"The Court will deny in part the motion to dismiss with respect to the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of G.L.c. 93A, because it concludes that the facts alleged by Mahanthappa in his complaint plausibly suggest that the TwistDx shareholders may be entitled to relief under each of those theories of liability. It will allow in part the motion with respect to the remaining claim, because the express contractual obligation to use commercially reasonable efforts displaces any implied obligation to use reasonable efforts. As agreed by the parties, the Court will also give Mahanthappa leave to amend his complaint to substitute the correct entity or entities as defendants instead of Abbott. …

"The facts alleged in the complaint plausibly suggest that Alere did not use commercially reasonable efforts to help TwistDx develop products; they also plausibly suggest that Alere reduced funding for TwistDx's operations without consulting with TwistDx and even though there was no reasonable basis to conclude that continuing to invest in the development of TwistDx products was no longer commercially reasonable. …

"Mahanthappa claims that, in addition to breaching the express terms of the amended merger agreement, Alere also violated an allegedly implied contractual obligation to use reasonable efforts to carry out its express contractual obligations to the TwistDx securityholders. This claim seems to be redundant. …

"Defendant's motion to dismiss is denied in part with respect to the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of G.L.c. 93A. The motion is allowed in part solely with respect to the claim in count III for breach of an allegedly implied obligation to use reasonable efforts. Plaintiff may file an amended complaint that substitutes Alere, Inc. — and, if appropriate, Innovacon, Inc. — as the defendant or defendants in place of Abbott Laboratories, Inc."

Mahanthappa v. Abbott Laboratories, Inc. (Lawyers Weekly No. 09-040-23) (7 pages) (Salinger, J.) (Suffolk Superior Court) (Docket No. 2284CV00969-BLS2) (March 31, 2023).

Damages

Default – Joint venture

Where a defendant was defaulted for failing to answer interrogatories, the plaintiffs should be awarded damages of $82,410.18.

"Defendant Aaron Hanson Cain was defaulted under Mass. R. Civ. P. 33(a)(4) for failing to answer interrogatories. ... On March 14, 2023, the case came before me for a hearing over Zoom to assess damages. Plaintiffs appeared through counsel and only offered the testimony of David Whitaker. I do not find Mr. Whitaker particularly credible. …

"The facts deemed admitted include that on January 8, 2021, Mr. Cain and David Whitaker, LLC, which is owned and operated by Mr. Whitaker, entered into a Joint Venture Agreement ('JVA') to be known as Hanson Cain, LLC, for the purpose of developing virtual depictions of Mr. Cain in various stages of nudity and sexual acts for e-commerce on the social media platform ONLYFANS.com. …

"Based on the evidence before me, a fair and reasonable approximation is an award of $82,410.18, which amounts to fifty percent (50%) of the total costs actually paid as of mid-April 2021. Such an award will cover most of the variable costs (i.e. costs for repairs, compensation to Mr. Cain, and costs for advertising and promotion over the short life of the JVA), while excluding the fixed or otherwise recoverable costs, and costs plaintiffs have not shown are within the scope of the JVA. …

"Final judgment shall enter for plaintiffs Hanson Cain, LLC and David Whitaker, LLC, jointly and severally, against defendant Aaron Hanson Cain in a total sum of $82,410.18, with interest thereon at the statutory rate from April 15, 2021 (the date the case was filed), plus court costs pursuant to Mass. R. Civ. P. 54(d)."

Hanson Cain, LLC, et al, v. Cain (Lawyers Weekly No. 09-029-23) (6 pages) (Krupp, J.) (Suffolk Superior Court) (Civil No. 21-880-BLS1) (March 22, 2023).

Insurance

Disability benefits – Statute of limitations

Where a plaintiff has asserted a breach of contract claim over disability benefits, the plaintiff's breach of contract claim is time-barred for any benefit period earlier than Dec. 12, 2016, but there is a triable breach of contract claim for damages arising from any unjustified delay by the defendant insurer in granting benefits.

"Presently before the Court is the motion filed by Defendants Unum Group and Paul Revere Life Insurance Co. ('Paul Revere') seeking summary judgment on Plaintiff Richard Constantino's claims for breach of contract (Count I), misrepresentation (Count II), intentional infliction of emotional distress (Count III), negligence (Count IV) and violation of Chapter 93A (Counts V). In this case, Constantino received Total Disability and Residual Disability benefits from Paul Revere as he requested them starting in 2013, and did not request a form of benefits, called Presumptive Total Disability benefits, until February 2017. He claims he is entitled to Total and Presumptive Total Disability benefits retroactive to 2013, when he first sought coverage but did not request these forms of relief. Paul Revere argues, in significant part, that this claim is limited by the Policy's contractual three-year statute of limitations, and that Plaintiff's claims are substantively meritless. …

"The three-year statute of limitations thus applies. This suit was filed on May 5, 2020. Subtracting the 54-day tolling period pushes this deadline March 12, 2020. Three years prior to that was March 12, 2017. The 90-day exclusion set out in §7.4 must be subtracted, pushing this deadline back to December 12, 2016. Thus, Plaintiff's breach of contract claim is time-barred for any benefit period earlier than December 12, 2016. …

"In this case, the record shows a delay in Paul Revere's granting Presumptive Total Disability benefits from February 13, 2017 to May 22, 2019, and the parties dispute whether this delay was justified under the Policy; indeed, it is unclear whether Paul Revere's conclusion in 2019 that Constantino had lost 'meaningful' use of his feet by 2017 and was entitled to Presumptive Total

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SUPERIOR COURT/ BUSINESS LITIGATION SESSION

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Disability benefits is consistent with its prior position that Constantino was not entitled to these benefits unless he had 'totally and irrecoverably los[t] … [u]se of both feet.' Accordingly, there is a triable breach of contract claim under these facts for the period of February 13, 2017 to May 22, 2019, but only for damages arising from any unjustified delay by Paul Revere in granting these benefits. …

"… In light of the parties' dispute regarding the reason for the delay in approving the claim, there is a triable claim under G. L. c. 93A/176D that Paul Revere failed to conduct a reasonable investigation and/or effect a prompt settlement after liability has become reasonably clear, in violation of G.L.c. 176D, §3(9)(d) or (f). ..."

Constantino v. Unum Group, et al. (Lawyers Weekly No. 09-039-23) (24 pages) (Ricciuti, J.) (Middlesex Superior Court) (Civil Action No. 2084CV944-BLS2) (March 10, 2023).

Securities

Stock purchase agreement – Non-recourse provision

Where a plaintiff that purchased shares of corporate stock has claimed breach of the implied covenant of good faith and fair dealing, that count must be dismissed because the plaintiff has not alleged that a gap exists in the language of the stock purchase agreement that would permit the invocation of the implied covenant of good faith and fair dealing under Delaware law.

"After purchasing the shares of JRNI, Limited ('JRNI'), plaintiff JRNI Holdings, Inc. filed suit against the shareholders of JRNI ('the Sellers') and JRNI's former chief executive officer, John Federman ('Federman'), for breach of representations and warranties in the stock purchase agreement concerning one JRNI customer. …

"Count II asserts a claim for breach of the implied covenant of good faith and fair dealing. …

"Plaintiff fails to allege facts to support this claim. Plaintiff complains about the accuracy of the JRNI's representations in the SPA (or its failure to disclose what was known prior to signing the SPA) about Nuffield [Health]'s intent to terminate its contract with JRNI. The representations and warranties, and the remedies for inaccuracies therein, are expressly addressed in the SPA. Plaintiff has not alleged that a gap exists in the language of the SPA that would permit the invocation of the implied covenant of good faith and fair dealing under Delaware law, nor can I detect from the SPA, or fairly infer from plaintiff's allegations, that any such gap exists. … In addition, plaintiff's claim relates to JRNI's pre-SPA conduct. The inaccuracy (or omissions) in the applicable representations and warranties regarding Nuffield allegedly occurred prior to or co-extensive with signing the SPA. As such, the alleged transgression occurred prior to the period for performance under the contract, which is the period that would be covered by the implied covenant of good faith and fair dealing. As a matter of law, such pre-contract action or omission cannot violate the implied covenant. For these reasons, Count II fails to state a claim for breach of the implied covenant under Delaware law."

Other counts

"Plaintiff brings three claims (Counts IV, V and VI) against Federman individually. Those claims, with the possible exception of the fraud claim, are barred by the non-recourse provision in the SPA. Even if they were not so barred, plaintiff still has not alleged sufficient facts plausibly to suggest an entitlement to relief on those claims. …

"Defendants argue that plaintiff's claims against Federman are precluded by the express terms of the SPA, which only authorize suit against parties to the SPA for claims arising from or relating to the SPA. I agree. …

"Even if claims against Federman survived the non-recourse provision of the SPA, those claims still fail to state a claim upon which relief may be granted. …

"Defendants' Motion to Dismiss Counts II-VI of the Amended Complaint (Docket #15) is allowed."

JRNI Holdings, Inc. v. PeakSpan Capital Growth Partners I, L.P., et al. (Lawyers Weekly No. 09-030-23) (19 pages) (Krupp, J.) (Suffolk Superior Court) (Civil No. 22-1787-BLS1) (March 8, 2023).

DISTRICT COURT/ BMC APPELLATE DIVISION

Civil practice

Competency – Substituted judgment

Where a respondent has filed an appeal challenging an order of involuntary medical treatment under G.L.c. 123, §8B, that order should be affirmed because there was no error in the court's determination that the respondent was incompetent and that, if competent, the respondent would choose to take antipsychotic medication.

"Here, the record reflects sufficient evidence to support the judge's determination that M.C. was incompetent. M.C.'s treating psychiatrist testified that M.C. suffered from schizophrenia and disorganized thought, that M.C. did not talk logically and could not have logical conversations, and that he responded to internal stimuli that only he could perceive. According to the doctor, M.C. denied he had any illness, did not believe he needed any treatment, and had no insight into his condition. The doctor further testified that M.C.'s condition was getting worse since he had stopped taking the psychiatric medication. In summary, the doctor opined that M.C. did not have the capacity to make an informed decision regarding a medical treatment plan based on his disorganized thinking and his inability to weigh the benefits and risks of medication. M.C.'s explanation about why he was not taking the medication provided further evidence of his disorganized thinking. We find no error in the court's determination that M.C. was incompetent.

"If a mentally ill patient has been deemed to be incompetent to make treatment decisions for himself or herself, a judge must determine 'what the patient would choose if he were competent.' *Guardianship of Weedon*, 409 Mass. 196, 199 (1991). The substituted judgment determination is the means by which the judge determines what the incompetent person would choose if he or she were competent. …

"Here, the judge weighed the relevant factors and appropriately concluded that M.C., if competent, would choose to take antipsychotic medication. The doctor testified that with the proposed treatment plan M.C.'s prognosis was good, and that without the proposed treatment his prognosis was very poor. The doctor testified that he believed, if competent, M.C. would take the medication because M.C. was previously highly functioning and enrolled in college and he could be restored to that level of functioning with treatment.

"Even though M.C. is incompetent, his preference is 'entitled to serious consideration.' ... The trial judge did consider that M.C. expressed a preference not to take the antipsychotic medication. However, the judge did not find reasonable M.C.'s refusal to take injected medication based on a problem he had in the past with injectable medications, as M.C. did not know what the medication was in the past that had caused the unwanted side effects. Further, the judge did consider the side effects of the medications proposed and modified the requested treatment plan to attempt the oral form of the medication first before using the injectable form of the medication. There was no evidence of any religious beliefs of M.C. that would impact his decision regarding medication. There was no evidence admitted regarding impact of treatment decisions on M.C.'s family. The judge found that, if competent, M.C. would accept the proposed treatment plan, and with some modifications imposed the Hospital's proposed treatment plan. The judge's decision regarding substituted judgment was supported by the evidence."

In the Matter of M.C. (Lawyers Weekly No. 13-014-23) (6 pages) (Ginsburg, P.J.) (Western District) Appealed from a decision by Power, J., in Worcester District Court. No brief filed for the petitioner; Mark Armstrong for the respondent (App. Div. No. 20-ADMH-45WE) (March 13, 2023).

LAND COURT

Licenses and permits

Gas station – Certiorari

Where a plaintiff, having obtained a special permit and site plan approval for a gas station, applied to the Seekonk Board of Selectmen for a new fuel storage license to install and use underground storage tanks, the board's decision to deny that application should be upheld because (1) there is a lack of subject matter jurisdiction over appeals of license decisions under G.L.c. 148, §13, and (2) the board's decision was not arbitrary and capricious and was supported by substantial evidence in the record.

"As part of the series of permits and licenses it needed for its planned gas station and convenience store in Seekonk, plaintiff Tayeh Realty, LLC (Tayeh) applied to the Town of Seekonk (Town) Board of Selectmen (Board) for a new fuel storage license to install and use underground storage tanks, as required under G.L.c. 148, §13. Notwithstanding the approval by the zoning board of appeals and the planning board of Tayeh's applications for a special permit and site plan review under the Town's Zoning Bylaws, the Board voted to deny Tayeh's application. Tayeh has brought this certiorari action under G.L.c. 249, §4, appealing the denial. The parties have filed cross-motions for judgment on the pleadings. …

"Before the court addresses the merits of the Motion for Judgment on the Pleadings and the Cross-Motion for Judgment on the Pleadings, it must determine if the Land Court has subject matter jurisdiction to hear this case. This action is brought as an action in the nature of certiorari under G.L.c. 249, §4. The Land Court has jurisdiction over actions in the nature of certiorari only if 'the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations.' G.L.c. 249, §4. Additionally, G.L.c. 185, §1(r), provides that the Land Court has original jurisdiction concurrent with the Supreme Judicial Court and the Superior Court over 'actions brought pursuant to section 4 ... of chapter 249 where any right, title or interest in land is involved, or which arise under or involve the subdivision control law, the zoning act, or municipal zoning, subdivision, or land-use ordinances, by-laws or regulations.' G.L.c. 185, §1(r). …

"This action does not involve any right, title, or interest in land. Nor does it arise under or involve a subdivision control law, a zoning act or municipal zoning, or a subdivision ordinance, by-law or regulation. Rather, it is an application for a license under G.L.c. 148, §13 (§13). … Based on this reasoning, the court has no subject matter jurisdiction over certiorari appeals of decisions under §13, as they do not arise under a zoning or subdivision control law or ordinance.

"At least one court has suggested that the broader phrase in G.L.c. 185, §1(r), should be read to expand the court's certiorari subject matter jurisdiction beyond claims brought under zoning or subdivision control bylaws. … Section 13 concerns the local licensing and regulation of the use and sale of flammable substances, including petroleum. G.L.c. 148, §§ 9, 13. The purpose of §13 is 'to provide licensing by fire prevention authorities of substantial use of materials deemed ... to be highly flammable.' *Frontier Research Inc. v. Commissioner of Public Safety*, 351 Mass. 616, 620 (1967). It is a 'licensing statute for the prevention of a fire hazard.' *Fallon v. Street Comm'rs of Boston*, 309 Mass. 244, 247 (1941). While the statute has been described as 'a rational method to aid and facilitate the supervision and regulation of land that is used in conducting a business of a hazardous nature,' … with the 'primary function of ... the supervision and regulation of a business or land use which, without proper supervision and regulation, might become a menace to public safety by reason of the hazards of fire and explosion,' *Chase v. Board of Selectmen of Littleton*, 2 Mass. App. Ct. 159, 160 (1974), the court finds that a permit under §13 is not a land use ordinance, by-law, or regulation. Rather, its primary purpose is to protect public safety and mitigate fire hazards, not to regulate land use. General Laws c. 185, §1(r), does not give the Land Court jurisdiction over certiorari cases arising under G.L.c. 148, §13. As such, the Land Court does not have jurisdiction to hear this action.

"Notwithstanding the foregoing, the court deems it prudent to address the merits of the cross-motions, in the interests of completeness and full adjudication. …

"The Board asserts that it considered a wide variety of issues in reaching its decision to deny Tayeh's application for an underground fuel storage tank license. This court agrees. …

"A board can consider a myriad of factors when deciding to approve or deny an application for a fuel storage license. Here, the Board considered potential risks to neighbors and abutters in the form of traffic, storage of fuel tanks close to abutting

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SUPERIOR COURT JUDGES' ASSIGNMENTS: MAY

COUNTY / ROOM	JUDGE	5/1	5/8	5/15	5/22	5/29
Suffolk County						
704 Crim. 1	Doolin	X	X	X	X	X
806 Crim. 2	Squires-Lee	X	X	X	X	X
808 Crim. 3	O'Shea	X	X	X	X	X
815 Crim. 4	Ricciuti	X	X	X	X	X
817 Crim. 5	McCarthy	X	X	X	X	X
906 Crim. 6	Ullmann	X	X	X	X	X
907 Crim. 7	Campo	X	X	X	X	X
914 Unified Session SDP	Pappas	X	X	X	X	X
713 Crim. Motions	Belezos	X	X	X	X	X
304 Civ. A	Rayburn	X	X	X	X	X
306 Civ. B	Ham	X	X	X	X	X
313 Civ. C	Gordon	X	X	X	X	X
314 Civ. D	Connolly	X	X	X	X	X
916 Civ. E	Cloutier	X	X	X	X	X
1006 Civ. F	Ames	X	X	X	X	X
1008 Civ. G	TBA					
1015 Civ. H	TBA					
1309 Business Litigation I	Krupp	X	X	X	X	X
1017 Business Litigation II	Salinger	X	X	X	X	X
Barnstable County						
1 Civ./Courtroom Main	Gildea	X	X	X	X	X
2 Civ./Courtroom 2	Donatelle	X	X	X	X	X
Berkshire County						
1 Crim./Civ.	Flannery	X	X	X	X	X
Bristol County						
9 Fall River Crim. 1	White	X	X	X	X	X
7 Fall River Crim. 2	Dupuis	X	X	X	X	X
6 Fall River Crim. 3	Perrino	X	X	X	X	X
8 Fall River Crim. 4	Pasquale	X	X	X	X	X
Main Taunton Civ./Crim.	Sullivan, S.	X	X	X	X	X
Lower New Bed. Civ. A	Yessayan	X	X	X	X	X
Upper New Bed. Civ. B	McGuire	X	X	X	X	X
Dukes County						
Main Civ./Crim.	Wilkins	X	X	X	X	X
Essex County						
K Salem Crim. 1	Buxton	X	X	X	X	X
J Salem Crim. 2	Drechsler	X	X	X	X	X
I Salem Crim. 3	Karp	X	X	X	X	X
H Salem Civ. A	Dunigan	X	X	X	X	X
2 Lawrence Civ. C	Tabit	X	X	X	X	X
1 Lawrence Civ. D	TBA					
4 Lawrence Crim.	Barrett	X	X	X	X	X
3 Lawrence Civ./Crim.	Howe	X	X	X	X	X
1 Newburyport Civ. B	Lang	X	X	X	X	X
Franklin County						
Courtroom 1	Hodge	X	X	X	X	X
Hampden County						
1 Crim. 1	Callan	X	X	X	X	X
3 Crim. 2	Mulqueen	X	X	X	X	X
8 Crim. 3	McDonough	X	X	X	X	X
7 Crim. 4	Goodwin	X	X	X	X	X
2 Crim. 5	Mason	X	X	X	X	X
6 Crim. 6	TBA					
5 Civ. A	Bucci	X	X	X	X	X
4 Civ. B	Manitsas	X	X	X	X	X
Hampshire County						
1 Crim./Civ.	Agostini	X	X	X	X	X
Middlesex County						
430 Woburn Crim. 1	Pierce	X	X	X	X	X
530 Woburn Crim. 2	Deakin	X	X	X	X	X
540 Woburn Crim. 3	Budreau	X	X	X	X	X
630 Woburn Crim. Mtns. 4	Frison	X	X	X	X	X
640 Woburn Crim. 5	Kazanjian	X	X	X	X	X
730 Woburn Crim. 6	Campbell	X	X	X	X	X
720 Woburn Civ. B	Sarrouf	X	X	X	X	X
740 Woburn Civ. C	Bloomer	X	X	X	X	X
620 Woburn Civ. D	Mulligan	X	X	X	X	X
710 Woburn Civ. H	Barry-Smith	X	X	X	X	X
520 Woburn Civ. J	TBA					
15 Lowell CV1	Wall	X	X	X	X	X
16 Lowell CV2	Ellis	X	X	X	X	X
17 Lowell Crim.	Haggan	X	X	X	X	X
Nantucket County						
Courtroom 1	No sessions					
Norfolk County						
Main Crim. 1	Cannone	X	X	X	X	X
25 Crim. 2	Freniere	X	X	X	X	X
10 Civ. A	Leighton	X	X	X	X	X
3 Civ. B	Hallal	X	X	X	X	X
20 Civ. C	Cowin	X	X	X	X	X
8 Civ. D	TBA					
Plymouth County						
1 Brockton Crim. 1	Davis	X	X	X	X	X
3 Brockton Crim. 2	Sullivan, W.	X	X	X	X	X
A Plymouth Crim. 3	Kirpalani	X	X	X	X	X
Main Plymouth Crim. 4	Buckley	X	X	X	X	X
5 Brockton Civ. A	Cahillane	X	X	X	X	X
4 Brockton Civ. B	TBA					
2 Brockton Civ. C	Glenny	X	X	X	X	X
Worcester County						
18 Crim. 1	Bell	X	X	X	X	X
10 Crim. 2	Kenton-Walker	X	X	X	X	X
17 Crim. 3	Reardon	X	X	X	X	X
20 Civ. A	Wrenn	X	X	X	X	X
19 Civ. B	Ritter	X	X	X	X	X
26 Civ. C	Yarashus	X	X	X	X	X
25 Civ. D	Tingle	X	X	X	X	X

(Editor's Note: The Appeals Court and SJC assignments are now available online at https://ma-appellatecourts.org/. The site lists which judge or panel is sitting for each case by docket number and case name. Log on to the website to check for any updates or changes in assignments.)

Supreme Judicial Court

The following full court sessions will be held at the John Adams Courthouse, 1 Pemberton Square, Boston.

Full court: May 1, 3, 5

The following single-justice session will be held at the John Adams Courthouse, 1 Pemberton Square, Boston.

May 8: Lowy

Appeals Court

Full court sessions:

May 1: (Worcester Superior Court, 225 Main Street, Courtroom 22, Worcester) Green, Wolohojian, Sullivan

May 2: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Milkey, Walsh, Smyth; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Neyman, Grant, Hershfang

May 3: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Meade, Blake, Brennan; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Massing, Ditkoff, Singh

May 4: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Vuono, Hand, Hodgens; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Henry, Desmond, Englander

May 8: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Green, Wolohojian, Sullivan; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Neyman, Grant, Hershfang

May 9: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Milkey, Walsh, Smyth; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Sacks, Shin, D'Angelo

May 10: (Essex Superior Court, 145 High Street, 2nd Floor, Newburyport) Meade, Blake, Brennan

May 11: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Vuono, Hand, Hodgens; (Christopher J. Armstrong Courtroom, John Adams Courthouse, Pemberton Square, Boston) Henry, Desmond, Englander

May 12: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Massing, Ditkoff, Singh

May 15: (Allan M. Hale Courtroom, John Adams Courthouse, Pemberton Square, Boston) Sacks, Shin, D'Angelo

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EMPLOYMENT

LAWYER

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Associate Attorney Position

Long Hagan Huff-Harris is looking for 2 Associates with a minimum of 1 year of litigation experience. Experience litigating in the Probate & Family Court is a plus, but not required. This can include clinical programs or law firm internships. Candidates must communicate directly with clients, courts, and opposing counsel regularly, have strong critical-thinking and creative problem-solving skills, have a high degree of trustworthiness and value transparency, be professional with a learned affect that still exudes empathy and caring, and be a motivated self-starter with a passion for representing individuals. The candidate must be technically proficient in both persuasive and legal writing. LHH Legal has a team-centered environment and a positive and supportive culture. The firm also provides benefits including 401(k) matching, health insurance, PTO, and hybrid (in-office & remote) work options. Please email a cover letter indicating your order of preference between Family Law, Estate Administration, and Estate Litigation along with a resume, writing sample, and list of 2-3 references to Melissa Berardi, Director of Administration and Finance, at berardi@lhhlegal.com.

CITY OF WORCESTER
ASSISTANT CITY SOLICITOR I AND III

The City of Worcester seeks three (3) attorneys to join the collaborative and congenial Law Department; two (2) Assistant City Solicitor I positions and one (1) senior-level Assistant City Solicitor III position. Qualified candidates must be a Massachusetts Bar member in good standing and have a valid driver's license.

The Assistant City Solicitor I positions are in the Advice & Counsel Division. One of the positions will have some crossover to basic litigation matters. The Assistant City Solicitor III will work in the Litigation Division on more complex civil litigation matters. To learn more or apply please visit: www.worcesterma.gov/employment.

The City of WORCESTER

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The New Hampshire Public Utilities Commission has a full-time opening for a SENIOR ADVISOR. Applicants should be current members of the New Hampshire Bar.

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Boutique law firm of five attorneys with a thriving trial practice is seeking an experienced associate with 4-5 years of litigation experience, including depositions, motion practice and trial experience. Must be admitted to both the state and federal courts in Massachusetts. This is an opportunity for a hard working and ambitious lawyer to expedite their partnership track. Compensation commensurate with experience. Please email cover letter, resume, and writing sample to **jduffy@bw.legal**

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Preeminent plaintiff-focused civil litigation firm in downtown Boston seeks ambitious and aspiring associate preferably with 5 or more years of litigation experience to manage full caseload, with opportunities to handle complex and challenging cases in personal injury, medical negligence, whistleblower, and employment litigation matters. This is a career changing opportunity for an associate who wants to join a team of nationally experienced and well-known trial lawyers. Please send resume to: lnquiry@LawyersWeekly.com (Refer to LWP Box #382 in the subject line)

Todd&WeldLLP

DOMESTIC RELATIONS ASSOCIATE

Todd & Weld LLP, a Boston-based firm of trial lawyers, seeks an associate with approximately 2-5 years of experience in complex domestic relations litigation. Candidates must have excellent writing, research, and interpersonal skills, and experience practicing in Massachusetts Probate and Family Courts. Candidates should desire to support and develop an active trial practice and be eager to take responsibility for a varied caseload with direct contact with clients, courts, experts, and other counsel. Must be admitted to practice in Massachusetts.

Todd & Weld values collegiality and diversity within our firm and is an equal-opportunity employer.

Please submit cover letter, resume, and writing sample via email to Shira Diner, Director of Associate Development & Recruitment, Todd & Weld LLP, sdiner@toddweld.com

PARALEGAL

PARALEGAL

A mid-size general practice Boston law firm, seeks an experienced paralegal/legal secretary for our North Station area office.

The position is part-time and offers flexible hours including some ability to work remotely and/or after normal working hours. Duties include managing the documentation and administration of simultaneous Summary Process actions in various courts of the Commonwealth. Attention to detail and organizational proficiency are critical attributes of the individual filling this position.

The position also involves occasional "overflow" secretarial work including work for different partners on days that our current full and part-time assistants are off. Strong proficiency with word processing (including comfort with the creation of documents as they are dictated), electronic document retention, as well as familiarity with creating and filing documents ancillary to litigation in all courts necessary. Experience with real estate transactions a plus.

This will initially be a three day (24 hour) per week position. The particular times and days per week will usually be flexible with some ability to work remotely on the Summary Process paperwork. Some degree of help with office administration will also be expected.

The firm provides quality legal services but in an informal atmosphere compatible with a healthy work-life balance.

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LAWYER

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Robinson Donovan, P.C., a litigation focused law firm located in Springfield, MA, is seeking an associate with 0-5 years of experience. The position will have a strong focus on employment litigation, advising businesses and individuals on employment related matters, as well as some general civil litigation.

The successful applicant will have immediate client contact, and opportunity for rapid advancement and growth with the firm. If interested, please send a cover letter, resume, writing sample and law school transcripts to Hunter S. Keil, Esq., Robinson Donovan, P.C., 1500 Main Street, Suite 2300, Springfield, MA 01115, or by email to hkeil@robinsondonovan.com

EMPLOYMENT LITIGATION ASSOCIATE

Portland, ME

Pierce Atwood LLP seeks an associate with 2-4 years of experience to join the Employment Practice Group in its Portland, ME office. Prior exposure to employment law would be helpful, but is not necessary. Prior litigation or clerkship experience strongly preferred. Applicants must have excellent writing skills, strong analytical ability, and work well with clients and colleagues. This role will be primarily focused on employment litigation and Position offers excellent growth potential in a dynamic employment sector, lots of client contact and a positive, collegial working environment in the Portland office of a mid-sized law firm based in the Northeast. No search firms please.

To apply, please submit your cover letter and resume to Heather Higgins at **hhiggins@pierceatwood.com**.

PIERCE ATWOOD LLP

LITIGATION ASSOCIATE

CETRULO LLP seeks a litigation associate with 3–7 years of experience, including depositions, motion practice, and trial preparation. Qualified candidates must be admitted to practice in Massachusetts (admission in other jurisdictions, including Rhode Island and New York, is beneficial, but not required). Cetrulo LLP associates have the opportunity to be fully involved in high-stakes litigation and interact meaningfully with clients in a collegial work environment. Compensation commensurate with credentials and experience. Please submit resume, cover letter and salary requirements to careers@cetllp.com. Equal Opportunity Employer / Diverse Candidates are encouraged to apply.

TRUSTS & ESTATES PARTNER

Boston, MA

Pierce Atwood LLP seeks a mid-level T&E partner for its Boston, MA office. Pierce Atwood LLP has an established and expanding T&E practice throughout four states in New England. The ideal candidate will be prepared to lead the T&E practice's Boston team into its next phase, joining one partner in that office as well as an additional partner and two associates serving Massachusetts clients from other offices.

We are seeking an ambitious and entrepreneurial attorney who has an excellent reputation in the area and can build on the firm's existing client base and advisor relationships to accelerate our growth in the Boston market. Responsibilities include independently managing all aspects of sophisticated estate planning and administration matters for high net worth clients. Applicants must have excellent leadership, communication, and mentoring skills, extensive experience in complex estate planning and administration, and deep knowledge of tax planning strategies, gifting, and trust planning and administration.

Please submit your cover letter and resume to Heather Higgins at hhiggins@pierceatwood.com.

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City of Lowell

The **City of Lowell** is seeking qualified, experienced, and energetic candidates for the position of **Second Assistant City Solicitor** in the Law Department. This position reports to the City Solicitor and assists in representing the City in all proceedings before any court, administrative board, legislative committee and any such body, when so requested by the City Solicitor. Conducts civil lawsuits, draws up legal documents, advises employees of the City as to legal rights, and practices other phases of municipal law. A Juris Doctorate Degree is required as well as an Attorney license to practice law in the courts of the Commonwealth of MA. Salary range is $87,730.76 (min) to $103,010.96 (max) annually.

Qualified individuals should apply by the deadline of May 2, 2023 by submitting application/resume with cover letter to Mary Callery, HR Director, using the City of Lowell job opportunities online portal: https://ess.lowellma.gov/employmentopportunities

EOE/AA/504 Employer.

ESTATE PLANNING OF COUNSEL POSITION

gravel & shea ATTORNEYS AT LAW

Gravel & Shea PC, a prominent law firm in downtown Burlington, Vermont, is looking for a qualified attorney with over 5 years of experience to fill an of counsel position in a mature, diverse estate planning practice. The qualified candidate will be self-directed, comfortable with client interaction, and have substantial experience in general estate planning, estate & gift tax planning, estate & gift tax return review and preparation, probate administration and trust administration. Experience in trust and estate litigation and tax controversy a plus. CPA or LL.M. in Taxation not required, but preferred.

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Gravel & Shea PC
P. O. Box 369
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Nolan Sheehan Patten LLP is a Boston-based firm representing non-profit and for-profit entities and government agencies in the development and financing of affordable housing and community development projects. More information on our practice is available on our website (www.nspllp.com). We offer competitive compensation with a full benefits program. Nolan Sheehan Patten LLP is an equal opportunity employer and strives to create a diverse and tolerant workplace.

Anyone interested should send a resume, cover letter, transcript and writing sample to Paula Burns at burns@nspllp.com or Nolan Sheehan Patten LLP, 84 State Street, Suite 940, Boston, MA 02109.

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LITIGATION ASSOCIATE

WT WATT TIEDER
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Watt, Tieder, Hoffar & Fitzgerald, LLP seeks to hire an associate attorney with 2-5 years of complex litigation experience to join its growing Boston office. Watt Tieder is one of the nation's premier boutique law firms focused on construction, surety and government contracts litigation. For 45 years, Watt Tieder has provided outstanding legal services to industry leading construction professionals in the United States and throughout the world. The firm practices before state and federal courts, the United States boards of contracts appeals, and various arbitration tribunals.

The ideal candidate will have considerable litigation experience, with an emphasis on written and verbal communication skills. Benefits include competitive salary, health, dental, life, long-term disability, 401k plan, and profit sharing. Applicants must be licensed to practice in Massachusetts, and licenses in additional New England states are encouraged.

Qualified candidates should send a letter of interest, resume, law school transcript, and a writing sample to Andrea Pavlas at apavlas@watttieder.com.

EMPLOYMENT

Edwin "Buzz" Farquhar at efarquhar@lawyersweekly.com or at 617-218-8119

LAWYER

FAMILY LAW ATTORNEY

Mirick O'Connell, a leading Massachusetts law firm with offices in Worcester, Westborough and Boston, is seeking a junior family law attorney to join the team in our Boston office.

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Excellent drafting and verbal communication skills, strong academic credentials, practical problem-solving ability and the ability to interact effectively with clients are required. We provide a collegial, team-oriented working environment, opportunity for hybrid schedule, excellent support, and competitive compensation and benefits.

If you share our commitment to outstanding client service and effective teamwork, we invite you to submit a confidential application on our website at:

www.mirickoconnell.com

Please include a cover letter, resume and writing sample addressed to:
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ATTORNEYS AT LAW

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EXPERIENCED ASSOCIATE

Union-Side Labor Lawyer

McDonald Lamond Canzoneri - Southborough, MA

A Boston, Massachusetts area union side labor law firm seeks a lawyer with 3 or more years' experience for an associate position. The firm represents a variety of public and private sector labor unions with combined membership in excess of 50,000 employees. The firm's practice encompasses all phases of labor relations, such as handling labor arbitrations, proceedings before the National Labor Relations Board and state labor boards, and collective bargaining negotiations.

The firm's goal is to hire for the long-term, and is invested in developing the candidate to gradually assume a full case load through a mentorship program. During this program, the associate will participate in the full range of the firm's practice. The legal work is especially rewarding for those with a strong interest in advancing social justice issues connected to the labor movement as well as developing litigation skills and persuasive written advocacy.

Qualifications: Successful applicant must have strong analytical skills and demonstrated excellence in writing; participation in journal, law review, or other substantial writing experience, and/or demonstrated commitment to practicing union-side labor law preferred.

Application procedure: Candidates should submit a cover letter, resume, law school transcript, and one or more writing samples by email to Candidate@masslaborlawyers.com. The writing sample(s) should be the candidate's own work without substantial edits by others. For more information about the firm visit www.masslaborlawyers.com.

ASSOCIATE ATTORNEY

A small, busy general practice law firm in downtown Boston seeks litigation associate with 1-3 years experience. Strong writing, verbal, and analytical skills are required, combined with excellent time management and organization skills. Responsibilities will focus on: writing and research, initiating and responding to discovery, court appearances, and depositions. References and writing sample will be required. Ideal candidate will have the flexibility to, at times, branch out beyond litigation. Salary commensurate with experience. Please submit your resume in confidence to: **Inquiry@LawyersWeekly.com (Refer to LWP Box #64 in the Subject Line).**

MUNICIPAL LABOR ATTORNEY

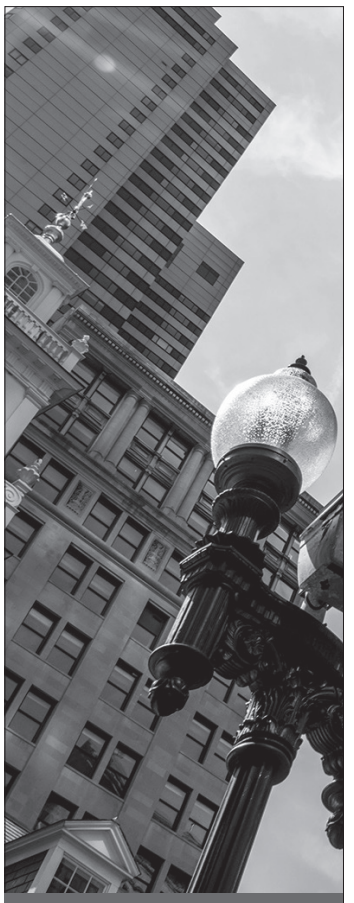
Mead, Talerman & Costa, LLC, the Commonwealth's fastest growing municipal law firm, seeks a lawyer with 2+ years' experience representing clients in public sector labor and employment matters. Positions for more experienced lawyers are also sought. The candidate should have some experience in some of the following areas: collective bargaining, including negotiating, fact-finding, mediation, and arbitration; managing grievances, disciplinary matters and unfair labor practices; and providing representation in administrative and court proceedings. Additional experience in general municipal matters is a plus, but not required. Competitive compensation, bonuses, and benefits - commensurate with experience. Flexible hours; will consider part-time positions. Remote work options. Send resume and writing sample in confidence to: Info@MTCLawyers.com.

MTC
Mead, Talerman & Costa, LLC
Attorneys at Law

SENIOR ASSOCIATE

BHPK

Brody Hardoon Perkins & Kesten, LLP is looking for an attorney with at least five (5) years of experience to join our talented, collegial, and good-humored team. We are a 16 lawyer boutique litigation firm located in the Back Bay. Our areas of practice include employment, civil rights, municipal, school, personal injury, insurance defense, and general litigation. We are a true TEAM of attorneys committed to meaningful and interesting work in an enjoyable work environment. Interested? **Send resume to Elizabeth Joyce at ljoyce@bhpklaw.com**



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ASSOCIATES AND OF COUNSEL ATTORNEYS

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Demerle Hoeger LLP, New England's premier mortgage default servicing firm, seeks attorneys to represent the firm's clients in the areas of foreclosure, litigation and bankruptcy. Demerle Hoeger has a hybrid work environment in its Boston office and will consider part-time / of counsel attorneys. Preference given to candidates with multiple bar admissions, including Massachusetts and one (1) other New England state. The firm seeks the usual attorney skill set: professional writing / speaking skills, energetic, detail-oriented and ability to work independently. The firm also seeks extraordinary attorneys who treat everyone — including opposing parties and opposing counsel — with respect and kindness. Please send resume and cover letter to dcoughlin@dhnewengland.com. No phone calls please.

CIVIL LITIGATION ASSOCIATE

We are seeking an associate with 2+ years' experience in civil litigation and licensed to practice in Massachusetts. As part of our medical malpractice defense team, you will have the opportunity to interact with medical providers, claims representatives and risk managers. You will represent clients in all phases of litigation as well as represent them for board matters. Daily tasks could include discovery, depositions, court appearances and trial preparation. This role is a full time position that is hybrid with two days from home and three days in the office. We have a full benefit package that includes full health and dental insurance for you and your family, life and disability insurance and reimbursement for bar fees and memberships. In addition, we have a 401k plan with profit share and match, eight paid holidays, three weeks PTO, and have a mentorship program in place.

Candidates should submit resume and cover letter with salary requirements to Ms. Colleen Fagan, Office Manager at colleen@fosteld.com

F&E FOSTER & ELDRIDGE LLP

CITY OF SOMERVILLE LAW DEPARTMENT

The City seeks to hire an Assistant City Solicitor/ Labor Counsel who reports to the City Solicitor. The Labor Counsel represents the City of Somerville in union negotiations and represents the City from the decision to hire through the conclusion of employment with the City. The position is full-time with excellent benefits. The starting salary is $108,243.22 annualized.

Visit somervillema.gov/apply to view the full job advertisement and to submit your job application.

COHEN | KINNE | VALICENTI | COOK

We are seeking talented attorneys to join our firm who want to enjoy both the practice of law and a great quality of life. We are a team with big city experience handling sophisticated matters, who choose to practice in the Berkshires for its wealth of outdoor and cultural opportunities. We are a growing firm with offices located in Pittsfield, Great Barrington, and Williamstown, offering a collegial atmosphere and excellent opportunities for the right candidate, hiring for the following partnership track positions:

REAL ESTATE AND LAND USE PLANNING ASSOCIATE

We are seeking an associate with 3+ years of experience to join the commercial real estate and land use planning division of our business and banking group. Qualified candidates will have significant experience representing clients in real estate acquisition and disposition transactions, financing, and land use transactional matters, including commercial real estate lending, construction lending, title matters, commercial leasing, and land use permitting.

LITIGATION ASSOCIATE

We are seeking an associate with 3+ years of experience working on civil litigation cases in state and federal court. Our litigation team works on a variety of cases, including business, employment, property, education, and tort matters. Candidates should have excellent communication skills and the ability to manage a variety of projects. Experience drafting pleadings, motions, and discovery is required. Court, trial, and deposition experience is preferred.

BUSINESS AND BANKING ASSOCIATE

We are seeking an associate with 3+ years of experience in the organization of business entities and business transactions. A candidate must possess excellent communication skills, a good sense of humor, and the ability to manage a variety of projects. Experience in general corporate and partnership law, mergers and acquisitions, and high-level transactional work is strongly preferred.

Interested candidates should submit a resume and writing samples to Melissa Cimini: mcimini@cohenkinne.com

ENFORCEMENT COUNSEL

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https://www.mass.gov/orgs/post-commission

THIS WEEK'S DECISIONS

For full opinions, visit masslawyersweekly.com

LAND COURT

Continued from page 22

properties, and loading zone issues. While the Board did not specifically articulate a fire risk, such a concern can be inferred from Chairman Sullivan's concerns about the dangers fuel tanks could pose at close proximity to neighbors. The Board considered not only traffic impacts, but also hazards of fire and explosion as required by G.L.c. 148, §13. Its decision was therefore not arbitrary and capricious, and was supported by substantial evidence in the record. …

"The Board's final argument is that the Board is not required to reach the same findings of fact as the ZBA and the Planning Board under the bylaws. This court agrees. … It was within the Board's discretion to reject Tayeh's licensing application despite the issuance of a special permit by the ZBA and the site plan approval for the project by the Planning Board.

"The Board's decision was not arbitrary and capricious, and it acted within its broad discretion in considering other factors besides fire and explosion risks in denying Tayeh's application for a license for underground fuel storage tanks. Because the Board's prior approval of other underground storage licenses is outside of this case's administrative record, it is irrelevant as evidence and cannot be considered. Moreover, Tayeh's claims that the Board's decision was not based on substantial evidence on the record and that the Board considered evidence outside of the record are unfounded. Finally, as asserted by the Board in its final claim, the Board was not required to reach the same findings of fact as the ZBA or the Planning Board. …

"For the foregoing reasons, the Motion for Judgment on the Pleadings is denied, and the Cross-Motion for Judgment on the Pleadings is allowed. Judgment shall enter affirming the decision and dismissing the complaint with prejudice."

Tayeh Realty, LLC v. Town of Seekonk (Lawyers Weekly No. 14-045-23) (14 pages) (Foster, J.) (Bristol Land Court) (Docket No. 22 MISC 000216) (April 19, 2023).

Mortgages

Sovereign immunity – Res judicata

Where a plaintiff challenging a foreclosure has filed a complaint against the commonwealth, the complaint should be dismissed under the doctrine of sovereign immunity and under the doctrine of res judicata.

"The Commonwealth first asserts that the complaint should be dismissed for lack of subject matter jurisdiction because the Commonwealth is protected by the doctrine of sovereign immunity. …

"Here, the Plaintiff has not alleged facts that make out a cause of action against the Commonwealth that falls within either of these exceptions. Indeed, the complaint acknowledges that there is no real controversy between the Plaintiff and the Commonwealth. ... Viewed in a light most favorable to the Plaintiff, the complaint does not allege a claim for which the Commonwealth has consented to liability. Even if I construe the Plaintiff's allegations as tantamount to an action to quiet title under G.L.c. 240, §§6-10, his complaint cannot survive the doctrine of *res judicata* which I will discuss next. Therefore, the Plaintiff's complaint should be dismissed under the doctrine of sovereign immunity. …

"The Commonwealth next argues that the complaint should be dismissed because the claims asserted by the Plaintiff were previously adjudicated in one or more of the previous lawsuits between the Plaintiff and US Bank. Thus, under the doctrine of *res judicata*, the Plaintiff may not litigate those issues or claims another time. …

"Here, the Plaintiff seeks to revisit the legality of the foreclosure undertaken by US Bank in 2011. … Whether the 2011 foreclosure was legal has been previously adjudicated — thrice. … The Plaintiff is barred by *res judicata* from litigating the legality of the 2011 foreclosure another time. Thus, his complaint must be dismissed under the doctrine of *res judicata*."

Harihar v. Commonwealth (Lawyers Weekly No. 14-039-23) (13 pages) (Smith, J.) (Middlesex Land Court) (Docket No. 22 MISC 000454) (April 4, 2023).

Real property

Adverse possession

Where a plaintiff has claimed ownership over Wyer's Way in Nantucket, the plaintiff is entitled to a declaration that it owns the fee in Wyer's Way by adverse possession, as Wyer's Way was used exclusively by the plaintiff's predecessor from 1970 until at least 2006.

"This is an adverse possession case that turns on the testimony of one witness: Aline Wommack. She is the daughter of Chester Plucinski, who built a dirt road in 1969 that led from New Lane, a public way in Nantucket, to a house he was building for his family at a property now known as 3 Wyer's Way. As it turns out, Chester built the road on land that was owned by members of the Brock and Chase families. Thirty-seven years later, those families conveyed the land to the Nantucket Islands Land Bank for conservation purposes. Now, the Land Bank and the current owner of 3 Wyer's Way, The Ceylon Elves, LLC, dispute the nature and extent of the rights which Ceylon Elves holds to use the dirt road built by Plucinski.

"The Land Bank acknowledges that Ceylon Elves holds some easement rights in the dirt road, which were acquired by prescription during Chester and Bettina Plucinski's ownership of 3 Wyer's Way. Indeed, the Land Bank unilaterally recorded an instrument in the Nantucket Registry of Deeds entitled 'Confirmation of Prescriptive Easement' in 2019, which describes what the Land Bank thinks should be the limitations of the prescriptive easement acquired by the Plucinskis.

"I previously denied the parties' cross-motions for summary judgment concerning the extent of the rights held by Ceylon Elves to use Wyer's Way because there were material disputes of fact that required a trial. In fact, I indicated in that decision that the primary questions of fact would turn on the credibility of Aline Wommack. Knowing that I could only assess the credibility and weight of the evidence by hearing live testimony, a trial was scheduled for October 25, 2022. The primary issue of fact was whether the Plucinskis' use of Wyer's Way was exclusive for a period of twenty years such that they acquired the fee in Wyer's Way by adverse possession — not just the prescriptive easement as the Land Bank acknowledged in the 'Confirmation of Prescriptive Easement.' …

"Ceylon Elves claims that it owns the fee in Wyer's Way as a result of the actions of the Plucinski family since Wyer's Way was constructed in 1970. Ceylon Elves bases this claim on the strength of the physical characteristics of Wyer's Way and the uncontroverted testimony of Aline Wommack. The Land Bank did not offer any evidence to counter Aline's testimony. Instead, it asserts that her testimony, by itself, is insufficient to establish each of the five elements of adverse possession because she did not live at the property between 1970 and 2002 and, therefore, does not have sufficient personal knowledge of how Wyer's Way was used during that timeframe. …

"The Land Bank has conceded that Ceylon Elves has a prescriptive easement over a portion of Wyer's Way as described in the 'Confirmation of Prescriptive Easement.' In so doing, it admits that the Plucinskis used a portion of Wyer's Way 'in a manner that has been (a) open, (b) notorious, (c) adverse to the owner, and (d) continuous or uninterrupted for a period of no less than twenty years.' … Indeed, the Land Bank concedes that the Plucinskis' use of Wyer's Way spanned some 37 years. However, for Ceylon Elves to establish that it owns Wyer's Way by adverse possession, it must also prove that the Plucinskis used Wyer's Way exclusively for, at least, 20 years. …

"In this case, Aline's knowledge that Wyer's Way was used exclusively by her parents and their invitees was based on her own observations when she visited Nantucket and on 'frequent' conversations she had with her parents on a regular basis since she left Nantucket in 1970 to pursue college and, then, a career. …

"At trial, I had the opportunity to view Aline's demeanor, which was important in assessing the accuracy and the credibility of her testimony. … I found her to be a reliable historian concerning her family's experiences in this general neighborhood since the early 1960s and its use of Wyer's Way since 1970. Her recollection of details — from the people to whom her father sold his houses to the condition of several of the properties in the area, including 3 Wyer's Way both before and after her father built the house there — reflected a familiarity with the area that lent further credibility to her testimony. I am persuaded that Wyer's Way was used exclusively by the Plucinskis from 1970 until, at least, 2006 when the Land Bank bought the Grove Lane property. Thus, I find and rule that Ceylon Elves is entitled to a declaration that is owns the fee in Wyer's Way by adverse possession. …

"For the reasons stated in this decision, I find and rule that Ceylon Elves owns the fee interest in Wyer's Way. Thus, judgment will enter in its favor and against the Land Bank on Count IV of the complaint. In light of this ruling on Count IV, the claims for a prescriptive easement in Counts I through III are moot. The 'Confirmation of Prescriptive Easement' recorded in the Nantucket Registry of Deeds in Book 1725, Page 207 is null and void and does not limit the rights of Ceylon Elves in Wyer's Way."

The Ceylon Elves, LLC v. Nantucket Islands Land Bank (Lawyers Weekly No. 14-043-23) (14 pages) (Smith, J.) (Nantucket Land Court) (Docket No. 20 MISC 000058) (April 19, 2023).

Real property

Trespass – Fence

Where a plaintiff filed a complaint against abutting defendants who erected a vinyl fence, that fence encroaches on the plaintiff's land, so the defendants are required to remove it.

"Plaintiff Zachary Etschman filed this lawsuit in November 2020, seeking to resolve a boundary dispute with his neighbors, defendants Jay and Maria Hutchinson. Etschman lives at 74 Ironstone Street in Millville, Massachusetts. When he first bought the property in March 2018, a wire fence (the 'Old Fence') ran along or near parts of what Etschman thought was the property's western boundary. The Hutchinsons owned the property on the other side of that boundary, at 78 Ironstone Street. …

"In late 2019, the Hutchinsons erected a vinyl fence (the 'New Fence') between 74 and 78 Ironstone Street. …

"The parties appeared for trial on December 19-21, 2022, and February 7, 2023. The Court took a view of 74 Ironstone Street, 78 Ironstone Street, and surrounding properties on the first day of trial. Having considered what it saw on the view, having heard the testimony of the parties' witnesses, having accepted the parties' stipulations of fact, having reviewed the exhibits admitted into evidence, and having heard (and read) the arguments of the parties and their counsel, the Court holds that the boundary between 74 and 78 Ironstone Street begins at Ironstone Street at an iron pin with cap set by G&H in 2018. It continues from there through the 'Section of Wire Fence Found' and a 'Section of Wire Fence Buried' as shown on the 2018 Plan; that line continues without deviation in its course or bearing until it reaches the Blackstone River, wherever it may be on any given day. The Court further holds that the New Fence encroaches on 74 Ironstone Street. The Court will require the Hutchinsons to remove it."

Etschman, et al. v. Hutchinson, et al. (Lawyers Weekly No. 14-046-23) (19 pages) (Vhay, J.) (Worcester Land Court) (Docket No. 20 MISC 000476) (April 20, 2023).

Real property

Unbuilt ways – Subdivision

Where a plaintiff has moved for summary judgment on its claim that it owns the unbuilt ways in a subdivision in common with the respondent owners of other lots in the subdivision, that motion should be denied because the plaintiff has not shown that it enjoys common ownership of the unbuilt ways in the subdivision with the respondents.

"… [Plaintiff] Woodland does not own an undivided interest in the entire length of the subdivision roadways, and thus is not a common owner of the roadways entitled to partition. …

Woodland, LLC v. The Horace A. Kimball & S. Ella Kimball Foundation, et al. (Lawyers Weekly No. 14-038-23) (16 pages) (Speicher, J.) (Norfolk Land Court) (Docket No. 20 MISC 00463) (March 31, 2023).

Real property

Prescriptive easement – Beach

Where the defendant purchasers of a vacant lot have claimed a prescriptive right to use a disputed beach, a judgment should enter declaring that the defendants do not have an easement to use the beach.

"In late June 2021, defendant Michelle J. Smith and her daughters, defendants Victoria R.L. Smith and Jessica K.Q. Smith, bought property at 2 Canal Place in Bourne, Massachusetts. Today's 2 Canal Place is Lot 314 on a plan entitled, 'Plan of Taylor's Point Shores in Buzzards Bay, Bourne, owned by Sun Valley Beach Inc.,' dated May 3, 1948, by Newell B. Snow, Engineer, recorded with the Barnstable Registry of Deeds [(the 'Registry')] in Plan Book 82, Page 89 (the 'Taylor's Point Plan'). The Smiths bought Lot 314 from Paul F. Shamon and Dimitrios Karakostas for

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$79,999.00 and received a deed in conjunction with the sale (the 'Smiths' Deed'). …

"Ms. Smith testified at trial she bought Lot 314 for beach rights. But Lot 314 has no beach: the nearest waterway, the Cape Cod Canal, is four parcels away from Lot 314 (in order, those parcels are Lots 315, 316, and 317 on the Taylor's Point Plan, plus a parcel owned by the U.S. Government). Lot 314 does border an unimproved cul-de-sac, Canal Place; Canal Place allows one to bypass Lots 315-316 and the government's property, but Lots 312 and 317 on the Taylor's Point Plan still separate Canal Place from the Canal. So anyone who owns Lot 314 and wants beach rights needs to get them from some other source.

"Ms. Smith thought she'd gotten them as part of the Smiths' Deed, as it says it grants the Beach Rights and access to the Bathing Beach via the Right of Way. This Court ruled on summary judgment in this case, however, that while Mr. Shamon had at one time the power to use the Right of Way and exercise the Beach Rights, those powers were appurtenant to his owning Lots 315 and 316. Between August 2000 and March 2001, Shamon had owned Lots 314, 315, and 316, and hence during that period (as the owner of Lots 315 and 316) he could use the Right of Way and exercise the Beach Rights. But Shamon sold Lots 315 and 316 (and with them, his deeded powers to use the Right of Way and the Beach Rights) in March 2001.

"Plaintiffs Karen and Philip Brendli reside at 50 Academy Drive, which is comprised of Lots 311 and 312 on the Taylor's Point Plan. They're two of the Taylor's Point lots that border the Cape Cod Canal and are subject to the Beach Rights. The Brendlis brought this action in July 2021 to halt the Smiths' use of any beaches on Lots 311 and 312 (the 'Disputed Beach'). After the Court's summary-judgment ruling, the Smiths claimed that even if Messrs. Shamon and Karakostas lacked conveyable *deeded* rights to use the Disputed Beach, Shamon (while owning Lot 314) had acquired such rights by prescription. The Smiths also contended that Lots 311 and 312 don't include the Disputed Beach, and hence the Brendlis don't have standing to keep anyone off it.

"… The Court holds that the Smiths haven't acquired by prescription any rights to use the Disputed Beach. But because the Brendis didn't establish at trial that they own the Disputed Beach, the Court will enjoin the Smiths only from using parts of Lots 311 and 312 outside of the Disputed Beach. The Court also will dismiss the Brendlis' claim to try title, as they haven't proven their standing to bring such a claim with respect to the Disputed Beach. …

"The Smiths' prescriptive-easement claim depends entirely on Mr. Shamon's use of the Disputed Beach. That use didn't establish prescriptive rights in the Beach, for two reasons. First, between August 2000, when Shamon acquired Lots 314-316, and January 2019, when Ursula Cinelli died, the Access Easement gave Shamon the right to use the Disputed Beach. Shamon had rights under the Access Easement even after he conveyed Lots 315-316 and their deeded rights in March 2001, since (a) he still owned Lot 314 and (b) as of June 2000, Lot 314 was part of what the Access Easement calls '4 Canal Place.' A person who's authorized to use an area may not claim prescriptive rights in it. ... The period in which Shamon lacked permission to use the Disputed Beach thus began only in January 2019, leaving Shamon with nowhere close to the twenty years he would have needed to establish prescriptive rights. ... Second, even if the Access Easement hadn't authorized Shamon's use of the Beach prior to January 2019, his use after March 2001 (when he conveyed his only Taylor's Point residence) through June 2021 (when he sold Lot 314 to the Smiths) wasn't sufficiently frequent to establish prescriptive rights to use the Beach for the uses the Smiths plan. …

"The Court will thus enter judgment in favor of the Brendlis on Count II of their Amended Petition and on the Smiths' counterclaim. The Court will declare that the Smiths don't have any estate or other private interest in any part of Lots 311-312, and will prohibit them and their successors in interest from so claiming. The Court also will declare that the Smiths have no right to cross portions of Lots 311-312 outside of the Disputed Beach to reach the Beach. But since the Brendlis haven't proven that the Disputed Beach is the product of accretion not aided by the Brendlis' predecessors in interest to Lots 311-312, the Court will not declare that the Brendlis own the Disputed Beach. Instead, the Court will dismiss Count I of their Amended Petition for lack of standing."

Brendli, et al. v. Smith, et al. (Lawyers Weekly No. 14-041-23) (18 pages) (Vhay, J.) (Barnstable Land Court) (Docket No. 21 MISC 000349) (April 14, 2023).

Real property

Redemption amounts – Fees

Where a plaintiff has moved for entry of a finding of the amounts a party-in-interest must pay to redeem two assessor's parcels, the redemption amount for assessor's parcel 38-107 is $6,996.02, while the amount for parcel 38-137 is $673,666.07.

"Plaintiff LHPNJ, LLC, successor in interest to the City of Taunton (the 'City'), has filed a fourth motion (the 'Fourth Motion') for entry of a finding under G.L.c. 60, §68, of the amounts (the 'Redemption Amounts') a party-in-interest must pay to redeem two assessor's parcels, numbered 38-107 and 38-137, on Whittenton Street in Taunton, Massachusetts (the 'Property'). …

"Two decisions of this Court, *LHPNJ, LLC v. Jefferson Development Partners, LLC*, 29 LCR 99 (2021) (Vhay, J.) ('*LHPNJ I*'), and *LHPNJ, LLC v. Jefferson Development Partners, LLC*, 29 LCR 491 (2021) (Vhay, J.) ('*LHPNJ II*'), discuss what happened previously in this case. …

"… While the Fourth Motion removes from the proposed Redemption Amounts most of the Subsequent Taxes, it still seeks recovery of a variety of 'subsequent' payments that are ineligible for inclusion in a redemption amount. The Fourth Motion also seeks to include in the Redemption Amounts substantial interest that accumulated on disallowed Liens, and asks for way too much in attorney's fees. …

"Having reviewed the parties' briefs and factual submissions, having heard two rounds of argument, and having heard the testimony presented at the Hearing, the Court finds:

"1. The redemption amount for assessor's parcel 38-107 is (a) $6,996.02 in principal and interest as of November 8, 2017; (b) interest that accrues at $1.13 per day beginning November 8, 2017, through the date of payment, on or before May 22, 2023; and (c) no attorney's fees;

"2. The redemption amount for assessor's parcel 38-137 is (a) $673,666.07 in principal and interest as of November 8, 2017; (b) in the amount (b) interest that accrues at $295.263 per day beginning November 8, 2017, through the date of payment, on or before May 22, 2023; and (c) $133,251.82 in attorney's fees; and

"3. Total costs, payable on or before May 22, 2023, are $493.97."

LHPNJ, LLC v. Jefferson Development Partners, LLC, et al. (Lawyers Weekly No. 14-044-23) (23 pages) (Vhay, J.) (Bristol Land Court) (Docket No. 16 TL 000652) (April 19, 2023).

Zoning

Merger – Joinder

Where plaintiffs have requested a declaratory judgment that two lots merged for zoning purposes, the defendant owners of one of those lots are not entitled to summary judgment despite their argument that they were improperly joined as defendants.

"Plaintiffs Charles D. Bonanno and Allison C. Bonanno, Trustees of the Ozone Realty Trust (the Bonannos), filed the Complaint in case no. 19 MISC 000328 (the 328 action) on July 2, 2019 (original 328 complaint) naming as defendants the City of Gloucester Zoning Board of Appeals, and its members David B. Gardner, Joseph Parisi III, Michael C. Nimon, Adria Pratt, Michele Holovak Harrison, and Catherine A. Schlichte (the ZBA), William Sanborn, the Building Commissioner for the City of Gloucester (the Building Commissioner), and Joseph and Gloria DiStefano (the DiStefanos). The original 328 complaint had two counts. Count I was an appeal, pursuant to G.L.c. 40A, §17, of the ZBA's June 13, 2019, decision denying the Bonannos' appeal of the determination of the Building Commissioner that the property owned by the DiStefanos at 13 Sleepy Hollow Road, Gloucester, Massachusetts (DiStefano property), is a buildable lot (ZBA decision). Count II sought a declaratory judgment pursuant to G.L.c. 231A, §§1-2, that the DiStefano property and the property owned by Gerard and Sheila McGovern (the McGoverns) at 15 Sleepy Hollow Road, Gloucester, Essex County, Massachusetts (McGovern property), merged for zoning purposes. …

"The DiStefanos filed the Complaint in case no. 19 MISC 000604 (the 604 action) on December 17, 2019 (604 complaint), naming as defendants the Bonannos and the McGoverns. The 604 complaint seeks a declaration pursuant to G.L.c. 231A, §1 et. seq., that the Bonannos' claim that the McGovern property and the DiStefano property merged for zoning purposes is barred by the doctrine of laches. …

"On May 27, 2022, the McGoverns filed the Motion to Dismiss Gerard and Sheila McGovern as Parties-in-Interest (Motion to Dismiss), Memorandum of Law in Support of Dismissal of Gerard and Sheila McGovern as Necessary Parties, and Affidavit of Gerard McGovern (McGovern affidavit or Aff.) in both the 328 action and the 604 action. …

"The McGoverns argue that they were improperly joined as defendants in the 328 action and the 604 action under Mass. R. Civ. P. 19. …

"The McGoverns allege that they lack any interest relating to the subject of the actions against the DiStefanos. Further, the McGoverns allege that the disposition of the actions in their absence will not impair or impede their ability to protect any future interest. Thus, the McGoverns claim, they are not necessary parties to the 328 or the 604 action. …

"The Bonannos have brought two claims in the amended complaint in the 328 action — an appeal of the ZBA decision and a claim for declaratory judgment. Both seek a determination that the DiStefano property and the McGovern property have merged for zoning purposes. In the 604 action, the DiStefanos seek a determination that the Bonannos' claim of merger is barred by laches. The McGoverns are necessary parties to the 328 and 604 actions for two reasons. First, a finding of merger by this court would result in the realization of new zoning violations at the DiStefano property and the McGovern property, which would affect the McGoverns and the McGovern property. Second, if the Bonannos succeed on their claim that the first amendment to the Lall Goldberg Trust, which was recorded shortly before the deed to the McGoverns, is a forgery, it could be found that both the DiStefanos and the McGoverns will be divested of record title. …"

Bonanno, et al. v. City of Gloucester Zoning Board of Appeals, et al. (Lawyers Weekly No. 14-037-23) (12 pages) (Foster, J.) (Essex Land Court) (Docket Nos. 19 MISC 000328 and 000604) (March 31, 2023).

Zoning

Standing – Comprehensive permit

Where (1) the Bellingham zoning board of appeals granted a comprehensive permit to build an affordable housing project with its sole means of access over Sunken Meadow Road in the Cranberry Meadows subdivision in Franklin and (2) the plaintiffs who own homes in that subdivision have filed a complaint including a count seeking judicial review of the zoning board's decision pursuant to G.L.c. 40A, §17, that count must be dismissed for lack of subject matter jurisdiction because the plaintiffs will not suffer cognizable harm from traffic or light pollution, so they lack standing to maintain a claim for judicial review under G.L.c. 40A, §17.

"This case pits a neighborhood in Franklin against a proposed residential development in Bellingham. The Plaintiffs, Paul and Caroline W. Griffith, and Susan M. and John J. Flaherty, Jr. (the 'Plaintiffs'), each own a home in the Cranberry Meadows subdivision in Franklin. Defendant, Hidden Meadow II Realty Trust, Edward Gately, Trustee ('Hidden Meadow'), is the project proponent whose locus abuts the Plaintiffs' properties but is located in Bellingham. At issue is the decision by the Bellingham zoning board of appeals granting a comprehensive permit to Hidden Meadow to build an affordable housing project on the land in Bellingham, with its sole means of access over Sunken Meadow Road in the Cranberry Meadows subdivision in Franklin. …

"This case presents the unusual combination of a zoning appeal wrapped in a question of access over a private road in *Franklin* to a Chapter 40B project in *Bellingham*. The parties disagree on which legal issue controls the outcome of this case. On the one hand, under several different theories, the Plaintiffs claim that the Bellingham zoning board's decision should be annulled because Hidden Meadow does not have the right to use Sunken Meadow for access to its project. Hidden Meadow, on the other hand, claims the Plaintiffs' multiple legal theories are really just a zoning appeal under G.L.c. 40A, §17, which should be dismissed because the Plaintiffs

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lack standing to maintain such an appeal.

"Because standing implicates this court's subject matter jurisdiction, I will start there. …

"Here, the Plaintiffs are abutters to the project property and, therefore, are presumed to be aggrieved by the Bellingham zoning board's decision. In the context of their zoning appeal, their claims of harm arise almost entirely from the expected increase in traffic that will result from the Burton Woods project once construction is completed. They claim that their section of Sunken Meadow Road will be less safe because more cars will drive by their houses. The Plaintiffs also claim that they will be harmed by air and noise pollution caused by passing cars and from lights emanating from the project that will be visible from their properties. …

"Based on my finding that the Plaintiffs will not suffer cognizable harm from traffic or light pollution, I find and rule that the Plaintiffs lack standing to maintain a claim for judicial review of the Bellingham zoning board decision under G.L.c. 40A, §17. Having found that the Plaintiffs lack standing, I do not reach the merits of the Plaintiffs' G.L.c. 40A, §17 appeal. Nevertheless, the substantive allegations in Count IV of the complaint allege that the Bellingham zoning board exceeded its legal authority in approving the comprehensive permit. To the extent that those allegations relate to the modification of the Cranberry Meadows subdivision in Franklin, they are addressed in the section of this decision that concerns Count I of the Plaintiffs' complaint. Therefore, the Plaintiffs' Count IV is dismissed for lack of subject matter jurisdiction. …

"As an alternative to their challenge to the project under G.L.c. 40A, §17, the Plaintiffs maintain that they may challenge the project under G.L.c. 240, §14A on the grounds that Burton Woods will violate the Franklin zoning bylaw. …

"The Plaintiffs seek a declaration that Hidden Meadow's use of its land in Bellingham for a 28-unit affordable housing project violates Franklin zoning because that use is not allowed in the Franklin 'Rural Residential I' zoning district where Sunken Meadow Road is located. Thus, they argue, this court should annul the Bellingham zoning board's decision because Burton Woods violates Franklin zoning, and because the Bellingham zoning board lacked the authority to 'waive' the Franklin zoning bylaw when it approved the comprehensive permit. This court has no such power under G.L.c. 240, §14A. …

"Even if one assumes that the Plaintiffs seek only a declaration that the access is use doctrine applies to force the Burton Woods project to comply with Franklin zoning, the Plaintiffs must establish a direct link between the permitted use of the Bellingham land and 'the use, enjoyment, improvement or development' of the Plaintiffs' land in order to have standing. ... The Plaintiffs have not established such a link. As I have previously ruled, the Burton Woods project will have a de minimis impact on the Plaintiffs and their respective properties. Thus, they also do not have standing to maintain the access is use claim under G.L.c. 240, §14A. …

"The Plaintiffs did not address the impact of Chapter 40B on their access is use argument nor has the court found another instance in which a Massachusetts court has addressed its applicability to an affordable housing project. However, the idea that an abutter, or a neighboring town for that matter, could stop an affordable housing project based purely on the access is use doctrine runs counter to the purpose of Chapter 40B and the means by which that purpose is achieved — overriding local zoning and land use requirements. …

"Although I have found and ruled that the Plaintiffs do not have standing to challenge the comprehensive permit under either G.L.c. 40A, §17 or G.L.c. 240, §14A, the Plaintiffs claim that they have standing to assert an independent claim for injury to their property rights in Sunken Meadow Road because such a harm is 'not within the scope of concern of the Zoning Act.' *Picard v. Westminster Zoning Bd. of Appeals*, 474 Mass. 570, 575 (2016). I agree. While the Plaintiffs may not challenge the zoning board's decision under G.L.c. 40A, §17 or G.L.c. 240, §14A, they have a claim to vindicate their rights in Sunken Meadow Road. …

"Based on the evidence at trial, the physical characteristics of the easement, the general language used to describe its purpose, and the knowledge all residents of the Cranberry Meadows subdivision had that Sunken Meadow Road could someday be extended into Bellingham for the purpose of further development, I find that the Burton Woods project will not overburden the easement. While the project is denser than permitted as of right in Bellingham or Franklin, it is a reasonable use of Sunken Meadow Road based on the language of the easement and Hidden Meadow's right to full enjoyment of the Bellingham parcel. …

"For these reasons, the decision of the Bellingham zoning board to grant Hidden Meadow a comprehensive permit is upheld. Judgment shall enter affirming the Board's decision and dismissing the Plaintiffs' appeal with prejudice, except as to Count I because the Plaintiffs' claim under G.L.c. 41, §81Y is not ripe for adjudication."

Griffith, et al. v. Wright, et al. (Lawyers Weekly No. 14-042-23) (43 pages) (Smith, J.) (Norfolk Land Court) (Docket No. 20 MISC 000036) (April 19, 2023).

Zoning

Standing – Driveway easement

Where plaintiffs have challenged a determination that property owned by the defendant in Gloucester is a buildable lot, the defendants' motion for summary judgment should be denied on the basis that the plaintiffs have alleged sufficient facts to create a dispute of material fact as to their standing.

"Plaintiffs Charles D. Bonanno and Allison C. Bonanno, Trustees of the Ozone Realty Trust (the Bonannos), filed the Complaint in case no. 19 MISC 000328 (the

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328 action) on July 2, 2019 (original 328 complaint) naming as defendants the City of Gloucester Zoning Board of Appeals, and its members David B. Gardner, Joseph Parisi III, Michael C. Nimon, Adria Pratt, Michele Holovak Harrison, and Catherine A. Schlichte (the ZBA), William Sanborn, the Building Commissioner for the City of Gloucester (the Building Commissioner), and Joseph and Gloria DiStefano (the DiStefanos). … Count I was an appeal, pursuant to G.L.c. 40A, §17, of the ZBA's June 13, 2019, decision denying the Bonannos' appeal of the determination of the Building Commissioner that the property owned by the DiStefanos at 13 Sleepy Hollow Road, Gloucester, Massachusetts (DiStefano property), is a buildable lot (ZBA decision). …

"The DiStefanos move for summary judgment on the grounds that the Bonannos lack standing to bring this action under G.L.c. 40A, §17. …

"… As owners of a property that either abuts the corner of the DiStefano property or abuts an abutter within 300 feet of the DiStefano property, the Bonannos have a presumption of standing. …

"The Bonannos raise as grounds for aggrievement density issues, interference with the use of their easement, pedestrian safety, restricted visibility, and impact on views. …

"While density and overcrowding are protectable interests that can confer standing on a plaintiff, the Bonannos have not offered evidence that the DiStefanos' proposed structure will cause overcrowding or violate density provisions. …

"The Bonannos' claim of interference with the use of their easement is, however, a concern about density sufficient, if credited, to confer standing. The Bonannos claim that their view of traffic will be obstructed while backing out of their driveway easement due to the DiStefano property development, in particular the location of the proposed structure close to the easement. This demonstrates an injury to a personal legal interest that the ordinance intends to protect. The ordinance's relevant objectives are 'to prevent overcrowding of land,' 'to avoid undue concentration of population,' and 'to facilitate the adequate provision of transportation.' The first two listed objectives aim to control density. Here, the DiStefanos' property development will allegedly interfere with the Bonannos' use of their easement because the DiStefanos' proposed structure will be built on an undersized lot that obstructs the Bonannos' view of Sleepy Hollow Road as they back out of their driveway. The Bonannos' claim of interference with their easement therefore relates to density and transportation, both of which are protected by the ordinance. This harm is articulated well enough to constitute a basis for standing. …

"While they have not shown on undisputed facts that the Bonannos do not have standing as a matter of law, the DiStefanos have rebutted the Bonannos' presumption of standing with respect to the Bonnanos' alleged harm to their use of the driveway easement. The DiStefanos have put in the record evidence that, if credited, would support a finding that their proposed structure would not interfere with the driveway easement, in the form of the DiStefano Affidavit and its exhibits. ... With this evidence, the DiStefanos have successfully rebutted the presumption of standing and created an issue of material fact, putting the burden on the Bonannos to substantiate their allegations of aggrievement and creating a genuine issue of material fact whether the Bonannos have standing, thus rendering summary judgment inappropriate. ... Therefore, while the Bonannos' presumption of standing with respect to the interference with their easement has been rebutted, the Motion for Summary Judgment will be denied on the basis that the Bonannos have alleged sufficient facts to create a dispute of material fact as to their standing."

Bonanno, et al. v. City of Gloucester Zoning Board of Appeals, et al. (Lawyers Weekly No. 14-036-23) (12 pages) (Foster, J.) (Essex Land Court) (Docket No. 19 MISC 000328) (March 31, 2023).

PROBATE & FAMILY COURT

Wills and trusts

Undue influence

Where a testator's two surviving brothers have objected to a 2017 will leaving his entire estate to two friends and neighbors, a motion to strike their objections should be allowed as to their claims of fraud, improper execution, and lack of testamentary capacity, but denied as to the issue of undue influence.

"The affidavit of objections alleges Decedent and his brothers had a close relationship, that they took weekly trips together (though it does not say for what time period); that they were beneficiaries under a prior will in 1998; that Decedent was dependent for some assistance on others; that his brothers helped him throughout his life, (though it is unclear what the extent of their involvement in more recent years was when Decedent moved to Bradford in 2011); that Decedent was assisted by his two neighbors, the proponents; that Decedent was not careful with his money and was susceptible to third parties' influence and persuasion, having on two occasions expended large amounts of money ($300,000) in one instance for no apparent value in return. The affidavit alleges Decedent was becoming increasingly dependent due to illness (though it does not say if this refers to physical or mental dependence). The affidavit alleges facts which if proved establish a person susceptible to undue influence, by individuals who were in a position to assert it. …"

Estate of Antanavich, Vincent (Lawyers Weekly No. 15-001-23) (3 pages) (Moriarty, J.) (Fiduciary Litigation Session) (Docket No. ES 22P3116) (March 29, 2023).

APPELLATE TAX BOARD

Taxation

Condominium – Assessment

Where a condominium unit in Fall River was valued at $266,100 for fiscal year 2019, the unit owners did not meet their burden of proving that the assessed value was greater than the fair cash value.

"This is an appeal filed under the formal procedure pursuant to G.L.c. 58A, §7 and G.L.c. 59, §§64 and 65 from the refusal of the Board of Assessors of the City of Fall River ('appellee' or 'assessors') to abate a tax on real estate owned by and assessed to Kathie Boyle and Joseph Carvalho ('appellants') for fiscal year 2019 ('fiscal year at issue'). …

"Based on the evidence presented, the Board found that the appellants presented insufficient evidence to support a finding that the subject condominium was overvalued. The appellants did not present any market evidence to demonstrate the price at which a willing buyer would agree to purchase the condominium from a willing seller which, as will be explained in the Opinion below, is the standard for establishing fair cash value in appeals before the Board.

"The appellee, on the other hand, presented evidence that two substantially similar units from the subject condominium's same development had sold close in time to the relevant assessment date — particularly the December 2017 sale for $279,000 —which supported the assessed value of $266,100 for the fiscal year at issue. …

"The Board has consistently defined fair cash value with reference to arm's-length sales of property shown to be sufficiently like the subject property. … The appellants, however, offered no valuation evidence to demonstrate what a willing seller and a willing buyer would agree to be a fair cash value of the subject condominium. …

"Accordingly, the Presiding Commissioner issued a decision for the appellee in this appeal."

Boyle, et al. v. Board of Assessors of the City of Fall River (Lawyers Weekly No. 20-014-23) (7 pages) (Commissioner Good heard the appeal and issued a single-member decision) Joseph Carvalho, pro se; Matthew Thomas for the appellee (Docket No. F337739) (March 24, 2023).

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PUBLISHER / EDITOR-IN-CHIEF
Susan A. Bocamazo, Esq. Ext. 8191
sbocamazo@lawyersweekly.com

EDITOR
Henriette Campagne, Ext. 8192
hcampagne@lawyersweekly.com

NEWS REPORTERS
Patrick Murphy, Esq.
pmurphy@lawyersweekly.com

Kristopher R. Olson, Esq. Ext. 8188
kolson@lawyersweekly.com

DIGITAL EDITOR
Matthew Cove, Ext. 8152
mcove@lawyersweekly.com

ADVERTISING DIRECTOR
Renee Baldwin
804-292-7412
rbaldwin@lawyersweekly.com

BUSINESS DEVELOPMENT CONSULTANT - CLASSIFIED
Buzz Farquhar, Ext. 8119
efarquhar@lawyersweekly.com

SENIOR MULTI MEDIA SALES EXECUTIVE
Elaine Fanning, Ext. 8222
efanning@lawyersweekly.com

MULTI MEDIA SALES EXECUTIVE
Yasmin Nasrullah, Ext. 8121
ynasrullah@lawyersweekly.com

REPRINTS
BridgeTower@EnVeritasGroup.com

CIRCULATION
1-877-615-9536
service@bridgetowermedia.com

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Opinion

'Altman' definition of gross negligence for punitive liability: time for a change

By Tory A. Weigand

A remnant of Roman law, degrees of negligence (slight, ordinary and gross) as well as the classification of behavior as "willful, wanton and/or reckless" lumbered into the common law with a substantial number of courts and legislatures proceeding to cabin conduct into these degrees of fault or culpability.

Gross negligence has persisted in Massachusetts, first in the law of bailments followed by older bygone automobile-guest principles and gratuitous undertaking liability, yet otherwise remaining a long-time feature of the wrongful death statutes.

Indeed, in 1917, the Supreme Judicial Court sought to remove any doubt whether degrees of negligence were part of Massachusetts common law, declaring that the issue was long "settled," with the court proceeding two years later, in 1919, to reassert the viability of degrees of negligence and proclaiming, in a bailment action, the now *Altman* "classic" definition of gross negligence in Massachusetts. *Altman v. Aronson*, 231 Mass. 588 (1919).

Today, gross negligence can be found in various discrete statutory provisions setting out immunity from "ordinary" negligence in a small number of specific relations and circumstances based on policy. It is comingled with "willful misconduct," "bad faith," "malice," and/or "willful, wanton, or reckless" and together declared the operative "exception" to the statutory liability exemption for such immunity.

Gross negligence reached its nadir in 1973, when it and the wanton, willful or reckless categorizations became fixtures in the wrongful death statute for purposes of punitive damages.

Despite its heritage and entrenchment, gross negligence in Massachusetts lacks coherency, and, as presently constituted, it is an inappropriate standard for imposition of punitive liability particularly in the medical care and treatment setting.

Altman's formulation that gross negligence "is substantially and appreciably higher in magnitude than ordinary negligence"; "very great" or "aggravated" negligence; the "absence of slight diligence" or "want of scant care"; or a "heedless or palpable violation of a legal duty" all otherwise "informed" by further "considerations" pulled primarily from the antiquated automobile guest liability case law, is removed from the purposes and function of quasi-criminal imposition of punitive liability.

Not only is it out of step with every other jurisdiction as to the standard for punitive liability and the need for a culpable state of mind, it has otherwise resulted in a definitional labyrinth of generalities providing an unworkable standard for purposes of punitive liability in the medical care setting.

The stated demarcations between "ordinary" and "gross" negligence and between gross negligence and recklessness remain muddled and corrupted by the limits of language and the elasticity of negligence and the reasonably prudent person.

The recent Superior Court model instruction on gross negligence continues and may worsen this muddle by presenting a description as well as mandating the inclusion of the "considerations" or "criteria" that are inconsistent and lacking in meaningful clarity in the medical care setting.

To be sure, the nature of egregious or outrageous conduct in any tort proceeding as with "ordinary negligence" lends itself to inherent imprecision.

Indeed, it can be argued that vagueness is an implicit characteristic particularly with punitive liability and provides juries with the necessary discretion to apply the doctrine flexibly to the circumstances at issue.

Who can truly quibble with the notion that "it is the jury's function to make the difficult and uniquely human judgment that defies codification and builds discretion and flexibility to a legal system"?

Yet, this same "flexible" discretion can lead to inconsistency and injustice, with it imperative that the law provide meaningful advance notice and specificity particularly when quasi-criminal, uninsured liability is at stake.

It is bedrock to our constitution that individuals are entitled to fair notice of the conduct that will subject them to punishment, with it otherwise violative of due process where punishment is levied based on law that is unclear and indeterminate to a reasonable person and as to the line between non-punitive and punitive liability.

Other than perhaps its reference and use of "slight diligence" or "want of scant care," *Altman*'s formulation is not only horribly vague and indeterminate as to advance fair notice of what is or is not punitive conduct in the medical care setting, it has no workable applicability to punitive liability to the minimum medical consensus standards of care that govern liability.

There remains no justification not to have as much coherent, targeted precision as possible with evaluation of medical care dependent on minimum medical consensus standards further dependent, in most cases, on expert identification and with punitive liability more justly necessitating willful, reckless or callous disregard to patient welfare.

The stated demarcations between "ordinary" and "gross" negligence and between gross negligence and recklessness remain muddled and corrupted by the limits of language and the elasticity of negligence and the reasonably prudent person.

At bare minimum, there must be clear instructions targeted and responsive to both the medical consensus standards of care and the quasi-criminal nature of punitive liability; a more demanding burden of proof; and the obligation of the courts to scrutinize the evidence both before and after jury submission articulating the dispositive facts and reasoning as to why the conduct is or is not sufficiently egregious for purposes of punitive liability.

Most fundamentally, the justifications and rationale for degrees of negligence and particularly the *Altman* definition of gross negligence for purposes of wrongful death punitive liability remain lacking.

The law of bailment including its degrees of negligence, as well as the historical use of "gross negligence" including as to gratuitous undertakings, are removed from the function and purpose of punitive liability as well as medical consensus standards of care.

It is telling that the SJC has identified "recklessness," not gross negligence, as the irreducible common law minimum duty in the discreet areas of common law exemption from ordinary liability where it has been addressed and in the balancing of liability insulation with accountability.

While gross negligence has been included in the wrongful death statute, it is undefined and must be viewed and understood as to the function and purpose of punitive, quasi-criminal liability. The fact that gross negligence is comingled and accompanied by willful, wanton or reckless language raises the specter of whether there was any true or meaningful intent to distinguish the two as to the need for actual or constructive intent fundamental to punitive liability.

As much as traditional Massachusetts jurisprudence (i.e., *Altman*) has attempted specific definitions and distinctions between the various terms in isolation, their collective and joint use in this setting is hard to ignore. There is a distilled collective essence with no indication of any need or desire to differentiate among the descriptions or to eliminate the mental state so fundamental to punitive liability. Even assuming intended differentiation, as the American Law Institute has stated in the Restatement, gross negligence to the extent defined as an extreme departure from the standard of care is insufficient to impose punitive liability as central to such liability is culpable intent, actual or constructive.

It remains anomalous and counter to common-sense notions of fairness to punish medical care providers who meant or intended no harm, and to award a windfall, in the form of quasi-criminal punitive damages, to someone who already has been fully compensated.

Such circumstances must and ought carefully to be limited and not left to be gleaned, in nearly every case no less, by a jury or fact-finder pursuant to the existing murky and elastic *Altman* "great negligence" formulation — a formulation declared in a 1919 bailment case and without any regard to the purpose and function of punitive liability.

Punitive damages are "quasi-criminal" and are not a "favorite in the law," with penal imposition on medical care providers devastating. Punitive liability and damages are expressly disfavored in Massachusetts requiring both statutory creation and strict construction.

Most fundamentally and consistent with the need to interpret and apply the wrongful death statute including punitive liability "so as to meet changes in the evolving life of the Commonwealth," there remains insufficient conceptual soundness to continue to attempt to differentiate and maintain meaningful distinctions between ordinary and gross negligence in medical malpractice actions for purposes of punitive liability based on the *Altman* articulation.

There is a compelling argument to be made that *Altman*'s "gross negligence" standard for punitive liability either needs to be retired or recalibrated in order for the law to properly evolve.

Indeed, the use of the *Altman* articulation to impose punitive liability without actual or constructive intention to injure is contrary and inconsistent with virtually every other jurisdiction, with Massachusetts also in the small minority of not requiring a clear and convincing burden of proof or providing for any express limitations.

The availability of "punitive" damages in medical malpractice actions involving wrongful death should be determined and measured via a more definitive and appropriate standard than offered by *Altman* otherwise in line with the quasi-criminal punishment, deterrence and retribution functions of such damages.

One who unintentionally fails in his or her duty, even if "very great," must make compensation for any resulting injury, but to warrant punitive liability there must be actual or constructive intent to inflict the injury. There is substantial precedent, including the Restatement, that to the extent gross negligence is perceived or defined as only "great" or "extreme" negligence, it is insufficient to justify punitive liability.

Punitive liability upon medical providers for wrongful death should and must require intention, malice or at least deliberate indifference or callous disregard of patient welfare.

In no uncertain terms, the time has come for change and, at bare minimum, a more distinct demarcation particularly in such an important modern setting as medical care and treatment. MLW

Tory A. Weigand is a partner at Morrison Mahoney in Boston.

The Fine Print

Contact Henriette Campagne at hcampagne@lawyersweekly.com

‘Get Trump’ tests readers’ own theories, opinions

By Harvey A. Silverglate and Emily Nayyer

Author’s note from Harvey Silverglate:

For more than a half-century, Professor Alan Dershowitz has been a law teacher, scholar, appellate lawyer, lecturer, advisor to public officials, and peripatetic good boy or bad boy, depending upon one’s view of surely the nation’s most controversial lawyer.

My own objectivity in reviewing any book by Dershowitz can doubtless be questioned. We have been friends and cohorts since the day we met at Harvard Law School in 1964 — me, a first-year law student; he, the youngest tenure-track professor in the school’s history. Each of us with a noticeable Brooklyn accent, we hit it off from the start. While I have tried to review his latest book with some objectivity, having Emily Nayyer as a co-author has been essential.

Dershowitz has dedicated “Get Trump” to me. The last half of the dedication reads:

“[Silverglate is] one of the very few people who understands — and is willing to publicly defend my principled support for the Constitution, even on behalf of Donald Trump.”

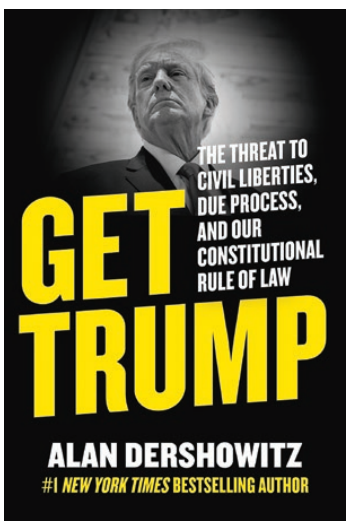
In this review, Nayyer and I will indeed seek to explain the importance of this book, the likely reason Dershowitz wrote it, and the reason all people — especially lawyers — should seek to understand the reactions of civil liberties-oriented lawyers to “the Trump era.”

***

Donald Trump has a legitimate claim on being the most controversial occupant of the White House in American history, despite the fact that he arrived there without ever having held public office.

Further, he won the presidency on the basis of getting more electoral votes but fewer popular votes than his opponent, Hillary Rodham Clinton.

Harvey A. Silverglate is a criminal defense and civil liberties lawyer and writer. He practices in Cambridge. Emily Nayyer is his research assistant and paralegal.



“Get Trump: The Threat to Civil Liberties, Due Process, and Our Constitutional Rule of Law”
By Alan Dershowitz
Hot Books, March 2023
168 pages; $24.29

His record as a New York-based real estate developer was quite controversial, involving an enormous amount of litigation over unpaid bills by a purported billionaire, as well as a number of failed projects. Despite all of this seeming baggage, Trump ended up in the White House.

It was no surprise to some observers that he ended up only the third president in American history to suffer the indignity of impeachment, and the first to be impeached twice.

Alan Dershowitz’s book tries to explain why Trump was, and remains, so controversial, and why representing him, even for a criminal lawyer, provoked such hostility from the general public, and even from some corners of the legal profession. As Dershowitz says in his opening paragraph:

“Now that Donald Trump has announced his candidacy for reelection as president, the unremitting efforts by his political opponents to ‘get’ him — to stop him from running — at any cost will only increase. These efforts may pose the most significant threat to civil liberties since McCarthyism.”

Dershowitz uses an apt historical analogy when he compares those in Congress and in the news media, as well as prosecutors on the state and federal levels, to Soviet dictator Josef Stalin’s notorious KGB head Lavrentiy Beria, who told Stalin: “Show me the man and I will show you the crime.”

Like the Soviet criminal code, the American federal statute books are filled with vague formulations that, as Dershowitz notes, would allow a federal prosecutor “to indict a ham sandwich.”

Dershowitz’s book is not a defense of Trump. In fact, he is meticulous at noting, more than once, that he is a “liberal Democrat” who voted for Hillary Clinton in the 2016 election won by Trump. But he makes clear that going after Trump by aggressive means stretches American law, both state and federal, and would produce results destructive of our libertarian democracy.

In order to avert such a disaster, Dershowitz proposes that before Trump, or any president, is indicted, two criteria be met. First, there should be unanimity across the political divide. Second, the former president’s crimes would have to be clear factually and legally. For these reasons, he is skeptical of the neutrality of “special prosecutors” as well as the attorney general when he unleashes his subordinates to investigate every nook and cranny of any single individual’s life.

Dershowitz then turns to members of the criminal defense bar. They must not be intimidated when choosing to represent exceedingly controversial and unpopular defendants. They do, after all, have a duty to fulfill the Constitution’s Sixth Amendment guarantee that all those accused shall “have the assistance of counsel for his defense.” In this regard, it is hardly a secret that Dershowitz suffered private and public opprobrium and the loss of longtime friends when he accepted Trump’s request to represent him at the first impeachment.

It is this unprecedented attack on these vital and precious institutions, rights and liberties that causes Dershowitz to quote the late former judge of the U.S. District Court for the Southern District of New York, Billings Learned Hand, who warned “that when the spirit of liberty dies among citizens, no institution can save it.”

Dershowitz poses the question thus: “[W]hich result is more likely to kill our spirit of liberty: the election of Trump or the attack on our liberties in an effort to prevent his election?” He describes his book as an attempt to answer that question.

Dershowitz makes clear in his introduction the reasoning behind those who believe that the indictment of Trump is necessary: “They see the threat posed by Trump as concrete and immediate, whereas the threat to our liberties is more abstract and long term.”

As such, Dershowitz sees himself as forward-thinking, looking out for the constitutional rights of not only Trump but all Americans. Yet, like many of those who have defended Trump’s constitutional rights despite politically disagreeing with him, Dershowitz has been “sought to be silenced,” having had his “free speech rights attacked,” his “integrity questioned,” and his career “threatened.”

Undoubtedly, those who approve of Trump’s indictment will vehemently disagree with Dershowitz and this book. Dershowitz criticizes the method by which the Mar-a-Lago search was conducted, condemns the suspension of Rudy Giuliani’s law license, questions the indictments of Peter Navarro and Roger Stone, and defends his decision to join Mike Lindell’s legal team.

It is important to acknowledge, however, that Dershowitz presents extensive legal knowledge and well-rounded opinions on all matters Trump and beyond. There will very well be constitutional scholars who will dispute his claims, and that is the significance of this book. Dershowitz is the poster child for controversial opinions, and his book allows those who oppose his views to see why he holds the views he does before jumping down his throat and accusing him of being a traitor of our nation.

Although this review, thus far, has been in praise of “Get Trump,” it is necessary to point out an issue with the book’s structure. The book is partly a collection of Dershowitz’s previously written articles and includes the transcript of a past interview.

On the one hand, this collection of pieces is a convenient and informative way for the readers to swiftly get an understanding of Dershowitz’s position in all matters related to Trump. However, the composition of the book consequently lacks flow. Dershowitz tends to jump from one idea to the next, and although there is a connection between these ideas, the connection can fray as a result of the sudden jumps.

For example, in a chapter dedicated to the ways the media and academia have censored controversial discourse, Dershowitz manages to jump from Twitter’s ban of Kanye West to the overruling of *Roe v. Wade* in a matter of a few pages. Although these subjects involve the suppression of people’s constitutional rights, one wishes that Dershowitz would have spent more time on them.

Arguably, he should have written a book that consisted of fewer previously written claims and more newly formulated ideas. As such, Dershowitz’s claims would be more detailed and perhaps even, as a result, more persuasive.

However, this critique is relatively minor and should not discourage people from reading “Get Trump.” In fact, it is a very worthwhile read, one that will likely test the reader’s own theories and opinions and, in turn, strengthen them.

“Get Trump” is an essential book that will not only emotionally charge its readers but encourage stimulating conversations among people with different opinions — a vital feature of a civil society. MLW